Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

ILLINOIS STATE UNIVERSITY, *et al.*,

Petitioners,

v.

DR. IRIS I. VARNER, *et al.*,

Respondents,

AND

UNITED STATES OF AMERICA,

Intervenor-Respondent,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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Dated: January 11, 1999

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UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

October 13 , 1998

Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*
Hon. JOEL M. FLAUM, *Circuit Judge*

DR. IRIS I. VARNER, *et al.*,
Plaintiffs-Appellees,

No. 97-3253 *v.*

ILLINOIS STATE UNIVERSITY, *et al.*,
Defendants-Appellants.

Appeal from the United States District, Court for the Central District of Illinois.

No. 95 C 1355
Michael J. Mihm
Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled case on September 4, 1998, by defendants-appellants, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.

No. 97-3253

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

IRIS I. VARNER, *et al.*,
Plaintiffs-Appellees,

and

UNITED STATES OF AMERICA,
Intervenor-Appellee,

v.

ILLINOIS STATE UNIVERSITY, *et al.*,
Defendants-Appellants.

Appeal from the United States District Court
for the Central District of Illinois.
No. 95 C 1355—**Michael M. Mihm**, *Judge.*

ARGUED FEBRUARY 26, 1998
DECIDED JULY 21, 1998

Before BAUER, HARLINGTON WOOD, JR., and FLAUM, *Circuit Judges.*

FLAUM, *Circuit Judge.* This appeal concerns the confluence of two recent, significant Supreme Court decisions, *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997), and *Seminole Tribe v. Florida*, 517 U.S. 44 (1996). The plaintiffs represent a class comprised of all tenured or tenure-track female faculty at Illinois State University ("ISU") from the 1982-83 academic year to the present. In 1995, they filed a complaint against ISU, four of its officials, its Board of Regents, and ten members of the Board (collectively,

"the University"). The plaintiffs alleged violations of the Equal Pay Act, 29 U.S.C. § 206(d), and Title VII, 42 U.S.C. § 2000e, and sought injunctive and monetary relief, including compensatory damages for intentional violations of Title VII under 42 U.S.C. § 1981a. The University, which is concededly a state entity, moved to dismiss the Equal Pay Act claim, as well as that part of the Title VII claim seeking compensatory damages. The University argued that its Eleventh Amendment immunity served as a bar to federal jurisdiction with respect to these claims. The district court denied the University's motion to dismiss. *See* 972 F. Supp. 458 (C.D. Ill. 1997), and 986 F. Supp. 1107 (C.D. Ill. 1996).

The University appealed the district court's denial of its Eleventh Amendment immunity defense. We granted the United States' motion to intervene to defend the constitutionality of this application of federal law to the States. We have jurisdiction over this interlocutory appeal pursuant to 28 U.S.C. § 1291 under the collateral order doctrine. *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 145 (1993). We affirm the district court's decision in all respects.

I.

The Eleventh Amendment provides, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. While the amendment by its terms appears to limit only the federal courts' Article III diversity jurisdiction, the Supreme Court has long "understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms." *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779

(1991). The text of the amendment, narrowly written to overrule the Supreme Court's decision in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), *see Seminole Tribe*, 517 U.S. at 67-70, stands for the larger proposition, inherent in our federal system, that each state remains a sovereign entity. *See id.* at 54 ("For over a century we have reaffirmed that federal jurisdiction over suits against unconsenting States 'was not contemplated by the Constitution when establishing the judicial power of the United States.' ") (quoting *Hans v. Louisiana*, 134 U.S. 1, 15 (1890)). Accordingly, the States enjoy an immunity from suit in federal court by all private parties for all causes of action, including suits arising under federal statutes. *See, e.g., Doe v. University of Ill.*, 138 F.3d 653, 656-57 (7th Cir. 1998). State sovereign immunity, however, is not absolute: A state may consent to suit in federal court[1] and, under certain circumstances, Congress may abrogate a state's Eleventh Amendment immunity.

Congress may constitutionally abrogate the States' Eleventh Amendment immunity under a particular statute if it both unequivocally expresses its intent to do so and acts pursuant to a valid exercise of power. *See Seminole Tribe*, 517 U.S. at 55. With respect to the latter inquiry, *Seminole Tribe* rejected the notion that the Indian Commerce Clause, U.S CONST. art. I, § 8, cl. 3, confers upon Congress the power to abrogate the States' Eleventh Amendment immunity. *See id.* at 71-73 ("The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction."). In so holding, the Court also explicitly overruled *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), in which a plurality of the Court held that the Interstate Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, gave Congress the power to abrogate state sovereign immunity. *See* 517 U.S. at 63-66.

[1] No party contends that Illinois has consented to suit in the instant case.

The Court in *Seminole Tribe* reaffirmed, however, that valid legislation pursuant to § 5 of the Fourteenth Amendment could serve as a basis for abrogating state sovereign immunity.[2] *See id.* at 59-60, 63-66 (discussing *Fitzpatrick v. Bitzer,* 427 U.S. 445 (1976)) ("*Fitzpatrick* was based upon a rationale wholly inapplicable to the Interstate Commerce Clause, viz., that the Fourteenth Amendment, adopted well after the adoption of the Eleventh Amendment and the ratification of the Constitution, operated to alter the pre-existing balance between state and federal power achieved by Article III and the Eleventh Amendment."). Thus, "[e]ven after *Seminole Tribe*, 'the Eleventh Amendment does not insulate the states from suits in federal courts to enforce federal statutes enacted under the authority of the Fourteenth Amendment.' " *Goshtasby v. Board of Trustees of the Univ. of Ill.*, 141 F.3d 761, 766 (7th Cir. 1998) (quoting *Crawford v. Indiana Dep't of Corrections*, 115 F.3d 481, 487 (7th Cir. 1997)).

The University raises a number of arguments contending that Congress did not validly abrogate the States' Eleventh Amendment immunity when it passed the Equal Pay Act. First, the University asserts that the Equal Pay Act does not contain a clear and unequivocal expression of Congress's intent to abrogate the States' immunity. Second, the University posits that Congress passed the Equal Pay Act pursuant to its power under the Commerce Clause and not pursuant to its power under § 5. The University argues that, following *Seminole Tribe*, Commerce Clause legislation cannot validly abrogate the States' immunity from suit in federal court. Third, the University asserts that the Equal Pay Act does not

[2] Section 5 of the Fourteenth Amendment provides, "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." This section enables Congress "to enforce" the Fourteenth Amendment's guarantees that no State shall "deprive any person of life, liberty, or property, without due process of law" or deny any person "the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

constitute valid legislation under Congress's § 5 power in any event. In this context, the University relies on the Supreme Court's interpretation of § 5 in *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997), in conjunction with the fact that the Equal Pay Act does not require proof of intentional discrimination to support a valid claim for relief. The University's Title VII argument is more narrow. It concedes that Title VII itself contains a clear statement of legislative intent to abrogate the States' immunity. *See Fitzpatrick*, 427 U.S. at 456. However, the University argues that 42 U.S.C. § 1981a, which made available a compensatory damages remedy to Title VII plaintiffs, is a distinct statute from Title VII that does not contain its own statement of congressional intent to abrogate the States' Eleventh Amendment immunity. We address these arguments in turn.

II. The Equal Pay Act

A. Intent to Abrogate

In deciding whether Congress unequivocally expressed its intent to abrogate the States' Eleventh Amendment immunity under the Equal Pay Act, it is helpful to consider the context and history of the statute. Congress passed the Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified at 29 U.S.C. § 206(d)), as an amendment to the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. § 201 to § 219. The Equal Pay Act, which prohibits wage disparities on the basis of sex,[3] therefore employs the same definitional and enforcement provisions as do the

[3] The Equal Pay Act provides in relevant part:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures

overtime and minimum wage provisions of the FLSA. *See* 29 U.S.C. §§ 203, 206-07, 216; *see also Timmer v. Michigan Dep't of Commerce*, 104 F.3d 833, 838 n.6 (6th Cir. 1997). In 1966, Congress amended the FLSA's definition of "employer" to include state government workers employed in hospitals, institutions, or schools. *See* Pub. L. No. 89-601 § 102(b), 80 Stat. 831 (amending 29 U.S.C. § 203(d)). The Supreme Court subsequently held, however, that the 1966 amendment to the FLSA did not abrogate the States' immunity from suit in federal court. *See Employees v. Department of Pub. Health & Welfare*, 411 U.S. 279, 284-86 (1973). As we have noted, *see Mueller v. Thompson*, 133 F.3d 1063, 1065 (7th Cir. 1998), Congress responded to *Employees* by amending certain provisions of the FLSA in the Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55, including its definitions of "employer," 29 U.S.C. § 203(d) & (x), and "employee," *id.* § 203(e)(2)(c), as well as its enforcement provision, *id.* § 216(b).[4]

Following the 1974 amendments to the FLSA, the term "employer" is defined to "include[ ] a public agency." 29 U.S.C. § 203(d). The statute in turn defines "public agency" to include "the government of a State or political subdivision thereof; any agency of . . . a State, or a political subdivision of a State." *Id.*

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earnings by quantity or quality of production, or (iv) a differential based on any other factor other than sex . . . .

29 U.S.C. § 206(d)(1).

[4] While our recitation of the history of the Equal Pay Act is helpful in understanding the context of the statutory provisions at issue, this history in itself has no bearing upon our inquiry into whether Congress unequivocally expressed its intent to abrogate the States' Eleventh Amendment immunity. Rather, that intent must be made "unmistakably clear in the language of the statute." *Dellmuth v. Muth*, 491 U.S. 223, 227-28 (1989); *see also, e.g., Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 204 (1991) ("Congressional intent to abrogate Eleventh Amendment immunity must be expressed in the text of the statute; the Court will not look to legislative history in making its inquiry.").

§ 203(x). The FLSA defines "employee" to include "any individual employed by a State, political subdivision of a State, or an interstate governmental agency." *Id.* § 203(e)(2)(C). Finally, the Act's private enforcement provision provides in pertinent part, "An action to recover the liability prescribed in either of the preceding sentences [including violations of § 206] may be maintained against any employer (*including a public agency*) *in any Federal or State court* of competent jurisdiction by any one or more employees." *Id.* § 216(b) (emphasis added).

In light of the plain statutory language, which authorizes "employees" to sue "public agencies" in federal court for violations of the Equal Pay Act, we have little difficulty holding that Congress clearly expressed its intent to abrogate the States' Eleventh Amendment immunity when it amended § 216(b) in 1974. We have previously hinted at this holding in both *Mueller*, 133 F.3d at 1065, and *Ende v. Board of Regents*, 757 F.2d 176, 177 n.3 (7th Cir. 1985), and we make it explicit today. In so doing, we join the other circuits that have examined this issue in the context of both the Equal Pay Act and the FLSA. *See Close v. New York*, 125 F.3d 31, 36 (2d Cir. 1997) (FLSA); *Mills v. Maine*, 118 F.3d 37, 41-42 (1st Cir. 1997) (FLSA); *Aaron v. Kansas*, 115 F.3d 813, 814-15 (10th Cir. 1997) (FLSA); *Timmer*, 104 F.3d at 837-38 (Equal Pay Act); *Hale v. Arizona*, 993 F.2d 1387, 1391-92 (9th Cir.) (en banc) (FLSA), *cert. denied*, 510 U.S. 946 (1993).

While the University concedes that the Equal Pay Act creates a private cause of action for state employees, it argues that the statute does no more than permit those employees to sue the States in their own courts. *Compare, e.g., Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468 (1987) (holding that the Jones Act does not abrogate the States' Eleventh Amendment immunity), *with Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197 (1991) (holding that the Federal Employers' Liability

Act, which provides the statutory remedial scheme for the Jones Act, creates a cause of action against state employers in their own courts). In this context, the University emphasizes that the statutory provisions discussed above do not contain any explicit references to the "Eleventh Amendment," or to "abrogation of state sovereign immunity." *See, e.g., Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 246 (1985) ("A general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment."). We previously have concluded, however, that such "magic words" are unnecessary, because "that degree of explicitness is not required." *Davidson v. Board of Governors*, 920 F.2d 441, 443 (7th Cir. 1990); *cf. Seminole Tribe*, 517 U.S. at 56-57 (holding that, even though the statute at issue did not refer explicitly to the Eleventh Amendment, "the numerous references to the 'State' in the text of [the statute] make it indubitable that Congress intended through the Act to abrogate the States' sovereign immunity from suit"). Rather, as we stressed in *Davidson*, all that is necessary is that Congress make "its desire to override the states' sovereign immunity clear[ ]" from the language of the statute. 920 F.2d at 443.

We recently addressed a similar assertion of Eleventh Amendment immunity by the State of Illinois under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-34, in *Goshtasby v. Board of Trustees of the University of Illinois*, 141 F.3d 761, 765-66 (7th Cir. 1998). *Goshtasby* explicitly reaffirmed *Davidson's* rationale on this point. *See id.* Moreover, *Goshtasby* rejected the notion that *Seminole Tribe* altered in any way the traditional inquiry to determine whether Congress unequivocally expressed its intent to abrogate. We concluded that *"Seminole Tribe* simply recycled [the] well-established verbiage in stating that Congress must be 'unmistakably clear.' The analysis was the same one federal courts have used for years." *Id.* at 766 (citations omitted). Thus, we

conclude that Congress expressed its intent to abrogate the States' Eleventh Amendment immunity when it amended the Equal Pay Act in 1974.

B. Power to Abrogate

But for the Supreme Court's holding in *Seminole Tribe*, our Eleventh Amendment inquiry into the Equal Pay Act would be complete, as the Equal Pay Act (along with the rest of the FLSA) clearly is within Congress's Commerce Clause powers. *See, e.g., Garcia v. San Antonio Metro. Trans. Auth.*, 469 U.S. 528 (1985); *Marshall v. City of Sheboygan*, 577 F.2d 1, 6 (7th Cir. 1978). However, as we have discussed, *see supra* at 3-4, *Seminole Tribe* established that Congress may only abrogate the States' Eleventh Amendment immunity through legislation validly enacted pursuant to its § 5 enforcement powers.[5] Because we must determine whether

[5] Accordingly, all of the circuits to have addressed the issue following *Seminole Tribe* have held that the minimum wage and overtime provisions of the FLSA do not validly abrogate the States' Eleventh Amendment immunity. Those circuits have rejected, either explicitly or implicitly, the argument that the wage and overtime provisions serve a valid Fourteenth Amendment purpose. *See Powell v. Florida*, 132 F.3d 677, 678 (llth Cir.), *cert. denied*, 66 U.S.L.W. 3780 (U.S. June 8, 1998) (No. 97-1667); *Quillin v. Oregon*, 127 F.3d 1136, 1137 (9th Cir. 1997); *Close v. New York*, 125 F.3d 31, 38 (2d Cir. 1997); *Mills v. Maine*, 118 F.3d 37, 48-49 (lst Cir. 1997); *Aaron v. Kansas*, 115 F.3d 813, 816-18 (l0th Cir. 1997); *Raper v. Iowa*, 115 F.3d 623, 624 (8th Cir. 1997); *Wilson-Jones v. Caviness*, 99 F.3d 203, 208-11 (6th Cir. 1996). In a case remanded to this Court by the Supreme Court for reconsideration in light of *Seminole Tribe*, we implicitly reached the same holding. *See Mueller v. Thompson*, 133 F.3d 1063, 1064 (7th Cir. 1997) (stating that, in light of *Seminole Tribe*, "[t]he only issue is whether Wisconsin has waived its Eleventh Amendment immunity from suit in federal court under the FLSA" and citing *Mills, Raper,* and *Wilson-Jones*). Three of these courts, though, expressly reserved the question of whether the Equal Pay Act validly serves a Fourteenth Amendment purpose. *See Mills*, 118 F.3d at 48; *Aaron*, 115 F.3d at 817; *Raper*, 115 F.3d at 624. Moreover, the Sixth Circuit, in holdin that the Equal Pay Act validly abrogates the States' Eleventh Amendment immunity, noted that its holding was not in tension with its contrary holding in *Wilson-Jones*. *See Timmer v. Michigan Dep't of Commerce*, 104 F.3d 833, 842 (6th Cir. 1997).

"the Act in question [was] passed pursuant to a constitutional provision granting Congress the power to abrogate," *Seminole Tribe*, 517 U.S. at 59, we therefore are required to consider two questions: (1) whether Congress, in applying the Equal Pay Act to the States, did so pursuant to its § 5 powers and, if so, (2) whether the Equal Pay Act is within Congress's § 5 powers, as interpreted by the Supreme Court in *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997).

1. Whether Congress Exercised its § 5 Powers in Making the Equal Pay Act Applicable to the States

In *EEOC v. Elrod*, 674 F.2d 601, 604-09 (7th Cir. 1982), we considered whether Congress had employed its § 5 enforcement powers when it amended the ADEA in 1974 to cover state employees.[6] Although we recognized that the 1974 amendments to the ADEA did not explicitly refer to Congress's § 5 powers, *id.* at 607-08, we did not believe that this fact was dispositive of our inquiry. Instead, we concluded that "the test of whether legislation is enacted pursuant to § 5 of the Fourteenth Amendment requires no talismanic intoning of the amendment. Rather, the inquiry is whether the *objectives* of the legislation are within Congress' power under the amendment." *Id.* at 608 (citation omitted). Because we concluded that the objectives of the 1974 amendments to the ADEA were "clearly tied to the guarantee of the Equal Protection clause of the Fourteenth Amendment," we held that Congress acted pursuant to its § 5 enforcement powers when it extended the ADEA's coverage to state and local government employees. *See id.* at 608-09.

We recently have had two opportunities to consider *Elrod's* rule, in *Doe v. University of Illinois*, 138 F.3d 653, 657-60 (7th

[6] These amendments to the ADEA, Pub. L. No. 93-259, 88 Stat. 74, were in fact included in the Fair Labor Standards Amendments of 1974—the same legislation that amended the FLSA. *See Elrod*, 604 F.2d at 605.

Cir. 1998), and in *Goshtasby v. Board of Trustees of the University of Illinois*, 141 F.3d 761, 766-68 (7th Cir. 1998). In *Doe*, which considered the State of Illinois's Eleventh Amendment challenge to Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, we explicitly reaffirmed *Elrod's* analysis, stating that "[t]he appropriate question is, were 'the objectives of [Title IX] . . . within Congress' power' " under the Fourteenth Amendment. 138 F.3d at 660 (alterations in original) (quoting *Elrod*, 674 F.2d at 608). Similarly, *Goshtasby*, which like *Elrod* addressed the ADEA, reaffirmed our holding in *Elrod*, concluding that "the rule remains that Congress need not use magic words to exercise its enforcement power under § 5 of the Fourteenth Amendment." 141 F.3d at 768. *See also Doe*, 138 F.3d at 678 (Easterbrook, J., respecting denial of rehearing en banc) ("Sex discrimination by public schools is a subject within the legislative power under § 5 of the fourteenth amendment, and Congress need not catalog the grants of power under which it legislates; courts do not remand statutes for better statements of reasons.").

Both *Goshtasby* and *Doe* also rejected the argument, which the University raises in the instant case, that *Elrod's* rule contravenes the Supreme Court's cautionary language that "we should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment." *Gregory v. Ashcroft*, 501 U.S. 452, 469 (1991) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 16 (1981)). We recognized in *Doe* that the inquiries involved in both *Gregory* and *Pennhurst* were not similar to our inquiry into whether Congress acted pursuant to § 5 in enacting legislation, the substantive reach of which was clear. Rather, we concluded, those cases concerned the substantive reach of statutory provisions and whether Congress intended to subject the States to mandatory obligations by enacting legislation pursuant to its § 5 powers. *See Doe*, 138

F.3d at 658 & n.6; *see also Goshtasby*, 141 F.3d at 767-68. "In the present inquiry, by contrast, the intended result (of subjecting States to suit for violations of [the Equal Pay Act's] substantive provisions) is clear, and the grant of power under which Congress acted is at issue." *Doe*, 138 F.3d at 658. We therefore continue to adhere to the method of analysis set forth in *Elrod*, which is consistent with the long-recognized rule that "the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948); *see also EEOC v. Wyoming*, 460 U.S. 226, 243 n.18 (1983) (recognizing that "Congress need [not] anywhere recite the words 'section 5' or 'Fourteenth Amendment' or 'Equal Protection' " in order to exercise its § 5 powers).

The Equal Pay Act, however, presents an additional wrinkle that prevents us from proceeding immediately to consider whether the objectives of the Act are within Congress's § 5 powers. The FLSA as originally enacted explicitly stated that the statute constitutes an exercise of Congress's Commerce Clause powers. *See* 29 U.S.C. § 202(b); *see also United States v. Darby*, 312 U.S. 100 (1941) (upholding the constitutionality of the FLSA as a valid exercise of Congress's Commerce Clause powers). Moreover, when Congress amended the FLSA in 1963 by passing the Equal Pay Act, it explicitly stated that it was relying on its authority to regulate interstate commerce. *See* Pub. L. No. 88-38, § 2(b), 77 Stat. 56, 56. This history would be unexceptional by itself, as it is consistent with Congress's pattern of enacting civil rights statutes under the Commerce Clause to regulate private conduct, as mandated by the holding of the *Civil Rights Cases*, 109 U.S. 3 (1883), and later amending those statutes pursuant to its § 5 authority to encompass government

conduct as well. *See, e.g., Elrod,* 674 F.2d at 606-08 (discussing this pattern with respect to Title VII and the ADEA).

The University contends, however, that Congress made a similarly express statement that it was exercising its powers under the Commerce Clause when it extended the FLSA to the States through the Fair Labor Standards Amendments of 1974. According to the University's argument, the Equal Pay Act is unlike the ADEA, in which Congress left the source of its power unstated when it extended the statute's coverage to the States. *See Goshtasby*, 141 F.3d at 767. Therefore, the University argues, the inquiry mandated by *Elrod*—whether the objectives of the statute are within Congress's § 5 powers—is simply inapplicable to this case. Rather, the University believes that we should take Congress at its word and definitively conclude that the 1974 amendments to the Equal Pay Act were enacted solely pursuant to its Commerce Clause powers.

As an initial matter, we note that another court of appeals has rejected the premise that Congress explicitly relied upon its Commerce Clause powers when it extended the Equal Pay Act's protections to the States. The Sixth Circuit, in addressing the identical question that is before us today, extensively analyzed the legislative history of the Fair Labor Standards Amendments of 1974[7] and reaffirmed its prior holding that "Congress did not expressly state the constitutional basis of its extension of the

[7] As our analysis in *Elrod* made clear, we must focus upon the particular legislation that extended a statute's coverage to the States, as opposed to the original statute itself, when determining the source of Congress's power. *See Elrod*, 674 F.2d at 604-08 (considering the 1974 amendments to the ADEA, as opposed to the original legislation enacted in 1967). *Accord, e.g., Mills v. Maine*, 118 F.3d 37, 43 (1st Cir. 1997) (considering the 1974 amendments to the FLSA as opposed to the original legislation); *Timmer v. Michigan Dep't of Commerce*, 104 F.3d 833, 838 n.7 (6th Cir. 1997) ("[T]he court properly focused on the 1974 amendments as opposed to the 1963 version of the Equal Pay Act. Although the 1974 legislation was an amendment to an already existing act, it was nevertheless a separate act of Congress.").

FLSA to the States in 1974." *Timmer v. Michigan Dep't of Commerce*, 104 F.3d 833, 838 (6th Cir. 1997). The court in *Timmer* noted that the report of the Senate Committee on Labor and Public Welfare, S. REP. No. 93-690, 93d Cong., 2d Sess. 24 (1974), merely indicated the Committee's belief that "it had the power to extend the FLSA to the States under the Commerce Clause." [8] *Timmer*, 104 F.3d at 838-39 n.7.

The Equal Pay Act, which Congress designated as severable from the other protections of the FLSA, *see* 29 U.S.C. § 219, is mentioned only once in the Senate Committee's 116-page report, in a discussion of the FLSA's historical background. *See* S. REP. No. 93-690, *supra*, at 6. Indeed, the relevant legislative history indicates that Congress concentrated primarily upon extending the FLSA's minimum wage and overtime provisions when it passed the Fair Labor Standards Amendments of 1974. *See id.*; *see also Timmer*, 104 F.3d at 846 n.2 (Boggs, J., dissenting) ("The items debated were primarily the minimum wage and overtime provisions."); *cf. Elrod*, 674 F.2d at 605 (noting that "[l]ittle legislative history exists on the ADEA amendment, . . . because the breadth and significance of the amendments to the FLSA overshadowed the ADEA amendment"). Thus, we do not accept the University's contention, which is solely based upon a murky legislative history, that Congress expressly relied upon its

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[8] The report states, in part:

> The Committee believes that there is no doubt that the activities of public sector employers affect interstate commerce and therefore that the Congress may regulate them pursuant to its power to regulate interstate commerce. Without question, the activities of government at all levels affect commerce.

S. REP. No. 93-690, 93d Cong., 2d Sess. 24 (1974). *See also* H.R. REP. No. 93-913, 93d Cong., 2d Sess. 2 (1974) ("It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct and as rapidly as practicable to eliminate the conditions above referred to . . . .").

Commerce Clause powers in extending the Equal Pay Act to the States. *Accord Mills*, 118 F.3d at 44 ("[O]ne cannot read Congress' statement regarding the Act's validity under the Commerce Clause to indicate that Congress intended to exclude other applicable constitutional bases for the Act.") (quotations and alteration omitted); *Timmer*, 104 F.3d at 838-39 n.7 ("We believe that this legislative history falls far short of an 'express statement' of congressional intent.").

Because we are unconvinced that Congress expressly declared its intention to proceed solely pursuant to its Commerce Clause powers, we conclude that *Elrod*'s analysis controls the present inquiry. Pursuant to this analysis, we have little difficulty in concluding that the objectives of the Equal Pay Act were within Congress's powers under the Fourteenth Amendment.[9] As we have discussed, *see supra* at 5-6 & n.3, the purpose of the Equal Pay Act is to prohibit arbitrary sex-based wage disparities. Prohibiting "arbitrary, discriminatory government conduct . . . is the very essence of the guarantee of 'equal protection of the laws' of the Fourteenth Amendment." *Elrod*, 674 F.2d at 604. Thus, we conclude that the Equal Pay Act constitutes an exercise of Congress's § 5 enforcement powers.[10]

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[9] We note that this conclusion is not dispositive of the issue of whether the extension of the Equal Pay Act to the States is constitutionally-valid legislation, which we consider *infra* at 16-22.

[10] Two other courts of appeals, in addition to the Sixth Circuit in *Timmer*, have arrived at the same conclusion. *See Usery v. Charleston County Sch. Dist.*, 558 F.2d 1169, 1171 (4th Cir. 1977); *Usery v. Allegheny County Inst. Dist.*, 544 F.2d 148, 155 (3d Cir. 1976), *cert. denied*, 430 U.S. 946 (1977). Those courts both rejected Tenth Amendment challenges to the Equal Pay Act under the then-prevailing rule of *National League of Cities v. Usery*, 426 U.S. 833 (1976), by holding that the Equal Pay Act was enacted pursuant to Congress's § 5 powers. We applied a different rationale to reject a Tenth Amendment challenge to the Equal Pay Act in *Marshall v. City of Sheboygan*, 577 F.2d 1 (7th Cir. 1978), but we expressly reserved the question of whether the statute was also a proper exercise of Congress's § 5 powers. *See id.* at 6 n.19.

2. Whether The Equal Pay Act is Within Congress's § 5 Enforcement Powers

The University argues that Congress exceeded its power to enforce the Fourteenth Amendment when it extended the protections of the Equal Pay Act to the States. In this context, the University relies on the fact that the Equal Pay Act does not require proof of an employer's discriminatory purpose. *See Fallon v. Illinois*, 882 F.2d 1206, 1213 (7th Cir. 1989) (recognizing that "the Equal Pay Act creates a type of strict liability in that no intent to discriminate need be shown") (quotation omitted); *see also Pollis v. New Sch. for Soc. Research*, 132 F.3d 115, 118 (2d Cir. 1997). Because claims of discrimination under the Fourteenth Amendment require proof of purposeful discrimination, *see, e.g., Personnel Adm'r v. Feeney*, 442 U.S. 256, 274 (1979), the University contends that the Equal Pay Act is not within Congress's power "to enforce, by appropriate legislation, the provisions" of the Fourteenth Amendment. U.S. CONST. amend. XIV, § 5. We previously have addressed similar challenges to Title VII's imposition of disparate impact liability. *See Liberales v. County of Cook*, 709 F.2d 1122, 1135 (7th Cir. 1983); *United States v. City of Chicago*, 573 F.2d 416, 422-24 (7th Cir. 1978). We rejected those challenges, holding that the prohibition of policies that had a discriminatory impact was "plainly adapted" to the end of "enforc[ing] the anti-discrimination provisions of the Equal Protection Clause." *Id.* at 423. The University argues, however, that the Supreme Court's holding in *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997), altered our prior understanding of Congress's Fourteenth Amendment enforcement powers and warrants a different result in the instant case.

In *City of Boerne*, the Supreme Court addressed the constitutionality of the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb-2000bb-4. RFRA was a legislative response

to the Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), in which the Court had held that the First Amendment's Free Exercise Clause did not require the States to provide exceptions from neutral, generally applicable laws that significantly burden religious practices. *See id.* at 887. Congress enacted RFRA, through its § 5 power to enforce the Due Process Clause, to overcome *Smith*'s holding. Accordingly, RFRA provided that laws that substantially burdened the exercise of religion must be justified as the least restrictive means of furthering a compelling state interest. *See* 42 U.S.C. § 2000bb-1.

The Court in *City of Boerne* considered whether legislative resurrection of the "compelling interest" test—"the most demanding test known to constitutional law," 117 S. Ct. at 2171—constituted a permissible exercise of Congress's § 5 power. The Court examined the legislative record and found that Congress did not enact this test in response to a history of unconstitutional conduct: "RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry." *Id.* at 2169. The Court concluded that RFRA was "so out of proportion" to the burdens on religion that Congress identified and attempted to prevent that the statute could not be understood as an effort to respond to, or prevent, unconstitutional behavior. *See id.* at 2170. Rather, the Court determined that RFRA "attempt[s] a substantive change in constitutional protections," *id.*, such that the statute went beyond attempting to "enforce" an established constitutional right. Because "Congress's power under § 5 . . . extends only to 'enforc[ing]' the provisions of the Fourteenth Amendment," *id.* at 2164 (alteration in original), the Court struck down RFRA as unconstitutional. *See id.* at 2172.

This analysis clarified what had been an unsettled question in regard to Congress's authority to enforce the Fourteenth

Amendment. The Court rejected the substantive, or "ratchet" theory, expressed most forcefully in *Katzenbach v. Morgan*, 384 U.S. 641, 653-56 (1966), which maintained that Congress could expand the substantive rights contained in § 1 of the Fourteenth Amendment even when the courts had explicitly refused to recognize the existence of such rights.[11] In rejecting this theory, the Court explained, "Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation." *City of Boerne*, 117 S. Ct. at 2164.

Accordingly, in order to determine whether legislation is appropriate under Congress's enforcement power, we must consider whether it deters or remedies unconstitutional conduct. *See id.* at 2163. However, legislation that satisfies this consideration may be appropriate "even if in the process it prohibits conduct which is not itself unconstitutional." *See id.* For an act to be appropriate remedial legislation, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect." *Id.* at 2164.

The University posits that the Equal Pay Act, by not requiring proof of discriminatory intent, necessarily proscribes some state action that is constitutional. Because of this feature, the

[11] The Court in *City of Boerne* asserted that "[a]ny suggestion that Congress has a substantive, non-remedial power under the Fourteenth Amendment is not supported by our case law." 117 S. Ct. at 2167. It did recognize that *Morgan* "could be interpreted as acknowledging a power in Congress to enact legislation that expands the rights contained in § 1 of the Fourteenth Amendment." *Id.* at 2168. However, the Court believed that this was "not a necessary interpretation, . . . or even the best one." Rather, the Court asserted that the legislation at issue in *Morgan* could be justified as a reasonable attempt by Congress to combat unconstitutional discrimination. *See id.*

University argues that the Equal Pay Act constitutes "substantive" legislation. This contention is not without some appeal.[12] The Supreme Court's recognition that Congress's "remedial" power "extends only to enforc[ing] the provisions of the Fourteenth Amendment" is difficult to reconcile with the Court's statement that remedial legislation may be appropriate "even if in the process it prohibits conduct which is not itself unconstitutional." *City of Boerne*, 117 S. Ct. at 2163-64. The Supreme Court recognized this difficulty, stating that "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern." *Id.* at 2164. Nonetheless, "the distinction exists and must be observed." *Id.* Therefore, we reject the University's contention that the Equal Pay Act automatically constitutes inappropriate legislation merely because it proscribes some constitutional conduct.

Instead, we consider whether the Equal Pay Act satisfies *City of Boerne's* "proportionality and congruence" test. *See id.* In

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[12] The Supreme Court's distinction between substantive and remedial legislation has not been applied uniformly in the courts of appeals. In the context of Eleventh Amendment challenges to antidiscrimination statutes, the distinction has resulted in disarray. *Compare Kimel v. Florida Bd. of Regents*, 139 F.3d 1426, 1433, 1448 (11th Cir. 1998) (holding, in a splintered opinion, that the ADEA does not validly abrogate the States' Eleventh Amendment immunity), *with Goshtasby v. Board of Trustees of the Univ. of Illinois*, 141 F.3d 761, 772 (7th Cir. 1998) (holding that the ADEA is a proper exercise of Congress's enforcement power); *compare also Autio v. AFSCME, Local 3139*, 140 F.3d 802, 805 (8th Cir. 1998) ("In passing the [Americans with Disabilities Act (ADA)], Congress was not attempting to make a substantive constitutional change."), *with Coolbaugh v. Louisiana*, 136 F.3d 430, 440 (5th Cir. 1998) (Smith, J., dissenting) ("Both RFRA and the ADA purport to establish greater rights for individuals against the states by increasing the measure of judicial scrutiny for conflicting state actions to a level higher than the Supreme Court has found appropriate under the Fourteenth Amendment."), *petition for cert. filed*, 66 U.S.L.W. 3783 (U.S. May 28, 1998) (No. 97-1941).

this context, it is significant that Congress inquired into the extent of sex-based wage discrimination in the workplace prior to enacting the Equal Pay Act.[13] *See, e.g.*, S. REP. NO. 176, 88th Cong., 1st Sess., 1 (1963). The Supreme Court has recognized that

> Congress' purpose in enacting the Equal Pay Act was to remedy what was perceived to be a serious and endemic problem of employment discrimination in private industry—the fact that the wage structure of "many segments of American industry has been based on an ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same."

Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974) (quoting S. REP. NO. 176, *supra*). Congress accordingly had substantial justification to conclude that pervasive discrimination existed whereby women were paid less than men for equal work. We accord these findings substantial deference, given that "Congress must have wide latitude," *City of Boerne*, 117 S. Ct. at 2164, to determine where the line lies between substantive and remedial measures. These legislative findings stand in contrast to RFRA, in which the legislative record was devoid of any reference to modern examples of the kind of unconstitutional conduct purportedly targeted by the legislation. *See City of Boerne*, 117 S. Ct. at 2169-70.

Moreover, in examining the provisions of the Equal Pay Act, we do not believe that their scope is out of proportion to the

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[13] Legislative findings in this context may be helpful to our inquiry. As the Supreme Court has recognized, however, they are not required. *See City of Boerne*, 117 S. Ct. at 2169-70 ("Judicial deference, in most cases, is based not on the state of the legislative record Congress compiles but 'on due regard for the decision of the body constitutionally appointed to decide.'") (quoting *Oregon v. Mitchell*, 400 U.S. 112, 207 (1970) (Harlan, J.)).

harms that Congress sought to redress. *See Goshtasby*, 141 F.3d at 772. In order to establish a claim under the Equal Pay Act, a plaintiff must demonstrate that the employer pays different wages to employees of the opposite sex "for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." 29 U.S.C. § 206(d)(1). This, however, does not automatically establish liability. Rather, employers enjoy three specific affirmative defenses: that the wage differentials are due to either (i) a seniority system, (ii) a merit system, or (iii) a system that measures wages by quantity or quality of production. *Id.* In addition, employers may avoid liability under a catch-all provision that affords a defense when the differential is "based on any other factor other than sex." *Id.* § 206(d)(1)(iv); *see also Fallon v. Illinois*, 882 F.2d 1206, 1211 (7th Cir. 1989). The broad scope of these defenses protects employers from liability when the employer has sound reasons for wage disparities ("any other factor other than sex"), but they allow for liability when no such reasons exist. We believe that these statutory provisions are reasonably tailored to remedy intentional gender-based wage discrimination. *Cf. United States v. City of Chicago*, 573 F.2d 416, 423 (7th Cir. 1978) (holding that Congress's extension of Title VII's protections to government employees was "clearly rationally related to and consistent with the 'letter and spirit' of the Fourteenth Amendment"). As we recognized in *Goshtasby*, the fact that the statute's sweep includes some constitutional conduct is not fatal. *See* 141 F.3d at 423 (quoting *City of Boerne*, 117 S. Ct. at 2163). The Equal Pay Act, unlike RFRA, does not redefine the substantive rights of the Fourteenth Amendment, nor are its provisions

out of proportion to the harms that Congress intended to remedy and deter.[14]

Thus, in light of the above, we conclude that Congress validly abrogated the University's Eleventh Amendment immunity from suit under the Equal Pay Act.

III. The Civil Rights Act of 1991

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, was amended by the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 78 Stat. 253, to expressly abrogate the States' Eleventh Amendment immunity. *See Fitzpatrick v. Bitzer*, 427 U.S. 445, 448-49 (1976). Title VII's definition of "person" was amended to include "governments, governmental agencies, [and] political subdivisions," 42 U.S.C. § 2000e(a), and the term "employer" is defined as a "person" who also satisfies other statutory conditions not relevant here. *Id.* § 2000e(b). The statute also defines the term "respondent" to include an employer. *Id.* § 2000e(n). Finally, the 1972 amendments included within the statute's definition of "employee" those individuals "subject to the civil service laws of a State government, governmental agency or political subdivision." *Id.* § 2000e(f). Title VII's enforcement provisions state that "a civil action may be brought against the respondent named in the charge . . . by the person claiming to be

[14] In a footnote to its Equal Pay Act argument, the University's Brief states: "To the extent that plaintiffs assert disparate impact claims under Title VII, those claims raise identical Fourteenth Amendment concerns." If the University is attempting to argue that, in light of *City of Boerne*, we should overrule *City of Chicago* and *Liberales*, it has waived this argument. *See, e.g., United States v. Berkowitz*, 927 F.2d 1376, 1384 (7th Cir. 1991) ("We repeatedly have made clear that perfunctory and undeveloped arguments . . . are waived (even where those arguments raise constitutional issues)."). At any rate, in light of the foregoing discussion, we see no reason to revisit those cases without the benefit of full briefing.

aggrieved," *id.* § 2000e-5(f)(1), and that "each United States district court . . . shall have jurisdiction of actions brought under this subchapter." *Id.* § 2000e-5(f)(3). These provisions make it unmistakably clear, as the Supreme Court recognized in *Fitzpatrick*, that Congress intended to abrogate the States' Eleventh Amendment immunity under Title VII. The University argues, however, that the Civil Rights Act of 1991 (CRA)—which for the first time provided a compensatory damages remedy for Title VII plaintiffs who proved intentional discrimination, *see* 42 U.S.C. § 1981a—does not contain a similar expression of legislative intent to abrogate.

The plain language of § 1981a shows that Congress intended to create an additional remedy for Title VII violations, as opposed to a separate cause of action. The statute provides:

> In an action brought by a complaining party under section 706 . . . of the Civil Rights Act of 1964 [42 U.S.C. 2000e-5] against a respondent who engaged in unlawful intentional discrimination . . . prohibited under section 703, 704, or 717 of the Act [42 U.S.C. 2000e-2, 2000e-3, 2000e-16], and provided that the complaining party cannot recover under [42 U.S.C. 1981], the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964 [42 U.S.C. 2000e-5(g)], from the respondent.

42 U.S.C. § 1981a(a)(1). As the University concedes, Congress incorporated Title VII's definitional provisions into § 1981a. These definitional provisions establish that the States, as potential "respondents," *see supra* at 22, are within the class of employers from which a "complaining party" under § 1981a may recover

compensatory damages, and they are not elsewhere expressly excluded from that class. *See* 42 U.S.C. § 1981a(a)(1) & (b)(2). Section 1981a defines the term "complaining party" to include "a person who may bring an action or proceeding under title VII of the Civil Rights Act of 1964." *Id.* § 1981a(d)(1)(A). Thus, a "complaining party" in an "action brought" under Title VII may be entitled to compensatory damages by showing that a "respondent" (which includes State governments) engaged in unlawful intentional discrimination. Further, as we have indicated, Title VII confers jurisdiction upon the federal courts for "actions brought" under its provisions. *See* 42 U.S.C. § 2000e-5(f)(3). Therefore, we conclude that the Civil Rights Act of 1991 merely creates an additional remedy for actions brought under Title VII. *See, e.g., Williams v. Banning*, 72 F.3d 552, 553 (7th Cir. 1995) ("Congress amended Title VII in the Civil Rights Act of 1991 to permit victims of unlawful intentional discrimination to collect compensatory and punitive damages. . . ."). It does not, as the University contends, create a distinct cause of action that would require its own statement of abrogation. When Congress authorized compensatory damages claims against Title VII respondents (who may be sued in federal court), it expressed its intent to authorize such claims against the States.

Our conclusion is further buttressed by Congress's explicit *exclusion* of the States as respondents that may be subject to punitive damages claims under Title VII. *See* 42 U.S.C. § 1981a(b)(1) ("A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision). . . ."). No similar exclusion exists with respect to claims for compensatory damages. *See id* § 1981a(b)(2). Congress would have had no need to provide this explicit exception to the CRA's expanded

remedies unless it understood the remainder of those remedies—including compensatory damages claims—to apply to the States. Indeed, "a limitation of liability is nonsensical unless liability existed in the first place." *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 13 (1989), *overruled on other grounds by Seminole Tribe v. Florida*, 116 S. Ct. 1114 (1996). Thus, we believe that the language of § 1981a makes clear Congress's desire to add remedies to Title VII (including a compensatory damages remedy against the States), rather than a separate cause of action. Under Title VII, the abrogation of the States' Eleventh Amendment immunity is settled. *See Fitzpatrick*, 427 U.S. at 448-49.

For the foregoing reasons, we reject the University's assertion of Eleventh Amendment immunity with respect to both the Equal Pay Act and the Civil Rights Act of 1991. We therefore affirm the decision of the district court.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF ILLINOIS

DR. IRIS VARNER, *et al.*,
Plaintiffs,

v.

ILLINOIS STATE UNIVERSITY, *et al.*,
Defendants.

Case No. 95-1355

FILED

JUL 30 1997

JOHN M. WATERS, Clerk
U.S. District Court
Central District of Illinois

ORDER

This matter is now before the Court on Magistrate Judge Robert J. Kauffman's Report & Recommendation and two Motions to Dismiss by Defendants. For the reasons set forth herein, the Report & Recommendation [#128] is adopted in part and rejected in part, Defendants' Motion to Dismiss [#71] is granted in part and denied in part, and Defendants' Motion to Dismiss [#18] is granted in part and denied in part as moot.

Background

The relevant facts of this case have been sufficiently set forth in the Report & Recommendation of the Magistrate Judge, as well as the prior Orders of this Court, and need not be restated here. Suffice it to say that this matter is brought on behalf of a

class including any female teaching faculty at Illinois State University who was an Assistant Professor, Associate Professor, or full Professor anytime during the period beginning with the 1982-1983 academic year up to and including the present. Plaintiffs allege that the class of women has been paid less than their male counterparts, given considerations of teaching experience, the number of classes and class size they taught, academic papers published, service to the University, and other matters to go to the quality of their services. Plaintiffs further allege that Defendants engaged in retaliation against female professors who complained of their alleged employment practices.

On September 24, 1996, the Court ruled on a motion to dismiss filed with respect to the original Complaint ("Motion to Dismiss 1"). Motion to Dismiss 1 was premised upon the argument that Plaintiffs cannot proceed in federal court on any claims based on the Equal Pay Act because the State of Illinois has not consented to suit. Upon the filing of Plaintiffs' First Amended Complaint, Defendants revived this motion to dismiss, as well as a second motion to dismiss that had been filed prior to the case being transferred to this district ("Motion to Dismiss 2"). Motion to Dismiss 2 challenged Plaintiffs' ability to hold Defendants liable in their individual capacities under Title VII and the Equal Pay Act. This matter then was referred to the Magistrate Judge under Local Rule 72.1 for a report and recommendation.

On May 22, 1997, Magistrate Judge Robert J. Kauffman entered a Report & Recommendation which recommended that the motions be granted in part and denied in part. Pursuant to Federal Rule of Civil Procedure 72(b) and 28 U.S.C. § 636(b)(1), the parties had ten (10) working days after service of the Report & Recommendation to file objections to the Magistrate Judge's decision. Objections were timely filed on behalf of both parties. Additionally, the United States sought and was granted leave to file a brief as *Amicus Curiae* with respect to the issue of sovereign immunity. This Order follows.

Discussion

In resolving a motion to dismiss, this Court must consider all well-pled facts as true and must draw all inferences in favor of the non-moving party. *Bontkowski v. First Nat. Bank of Cicero*, 998 F.2d 459, 461 (7th Cir. 1993), *cert. denied*, 114 S.Ct. 602 (1993). In ruling on a motion to dismiss, courts consider whether relief is possible under any set of facts that could be established consistent with the allegations in the Complaint. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). This Court will dismiss a claim only if it is beyond doubt that no set of facts would entitle the Plaintiffs to relief. *Venture Associates Corp. v. Zenith Data Systems Corp.*, 987 F.2d 429, 432 (7th Cir. 1993).

I. Motion to Dismiss 1—Sovereign Immunity

A. Equal Pay Act Claims

In their renewed Motion to Dismiss [#71], Defendants first allege that Plaintiffs' claims under the Equal Pay Act should be dismissed because the State of Illinois has not consented to be sued in federal court under this statute and such a suit is therefore barred by the Eleventh Amendment. Defendants rely on the Supreme Court's decision in *Seminole Tribe of Florida v. Florida*, U.S. , 116 S.Ct. 1114, 1123 (1996), which found:

> In order to determine whether Congress has abrogated the States' sovereign immunity, we ask two questions: first, whether Congress has "unequivocally expresse[d] its intent to abrogate the immunity," *Green v. Mansour*, 474 U.S. 64, 68, 106 S.Ct. 423, 426, 88 L.Ed.2d 371 (1985); and second, whether Congress has acted "pursuant to a valid exercise of power."

Seminole Tribe, 116 S.Ct. at 1123.

When last confronted with this issue in September 1996, the Court engaged in substantial analysis of the effect of *Seminole*

Tribe on suits brought pursuant to the Equal Pay Act. Ultimately, the Court determined that the portion of the Fair Labor Standards Act ("FLSA") constituting the Equal Pay Act was enacted to prohibit discrimination in pay based on sex in furtherance of the equal protection clause of the Fourteenth Amendment, which is a valid exercise of Congressional power.[1] After careful consideration of the briefs submitted in connection with this issue, as well as subsequent case authority,[2] the Court remains confident that the prior decision is correct and constitutes the law of the case. To the extent that Defendants seek reconsideration of this Court's prior finding that the Equal Pay Act was properly enacted in furtherance of Congress' power under the Fourteenth Amendment, such a request is denied.

However, Defendants now argue for the first time that Congress did not clearly express its intent to abrogate the Eleventh Amendment in enacting the Equal Pay Act. As this Court's September 24, 1996 Order did not contain an in-depth discussion of this aspect of the *Seminole Tribe* test, the Court will elaborate now in the interest of making a complete record.

The intent to abrogate "must be obvious from 'a clear legislative statement.' " *Seminole Tribe*, 116 S.Ct. at 1123, *quoting Blatchford v. Native Village of Noatak*, 501 U.S. 775, 111 S.Ct. 2578, 2584 (1991). Here, the Equal Pay Act itself contains neither definitions nor enforcement provisions. Rather, such

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[1] *Cf. Crawford v. Indiana Department of Corrections*, 115 F.3d 481, 487 (7th Cir. 1997) (finding that the Americans with Disabilities Act, "like other antidiscrimination statutes," was an exercise of Congressional power under the Fourteenth Amendment, as well as the Commerce Clause).

[2] In *Timmer v. Michigan Department of Commerce*, 104 F.3d 833 (6th Cir. 1997), the Sixth Circuit affirmed the holding of *Marshall v. Owensboro-Daviess County Hospital*, 581 F.2d 116 (6th Cir. 1978), cited in this Court's September 24, 1996 Order. In so doing, the Sixth Circuit found that, although not expressly stated, Congress clearly and properly acted in furtherance of § 5 of the Fourteenth Amendment in extending the Equal Pay Act to state employees. *Timmer*, 104 F.3d at 838-39.

interpretative terms and mechanisms must be drawn from the context of the remainder of the FLSA.

> The term "employer" is defined in the FLSA to "include[ ] a public agency," which in turn is defined as "the government of a State or political subdivision thereof" and any agency of a State. 29 U.S.C. §§ 203(d), (x). The term "employee" is defined to include "any individual employed by a State, political subdivision of a State, or an interstate governmental agency. *Id.* § 203(e)(2)(C). Finally, the private enforcement provision provides that "[a]n action to recover the liability prescribed . . . may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated."

Timmer, 104 F.3d at 837-38. Such language makes it abundantly clear that Congress intended to permit actions against states and state agencies under the Equal Pay Act, thereby purposely abrogating sovereign immunity from suit.

Thus, the Court concurs with the other courts which have confronted this question with respect to the FLSA and reached the conclusion that the FLSA's current definitional and enforcement provisions, which are fully applicable to the Equal Pay Act, as well as the accompanying legislative history, provide an unmistakably clear statement of Congress' intent to abrogate the states' sovereign immunity.[3] Accordingly, the Court finds that Congress

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[3] *See also Brinkman v. Department of Corrections*, 21 F.3d 370, 372 (10th Cir.), *cert. denied*, 115 S.Ct. 315 (1994); *Reich v. New York*, 3 F.3d 581, 590-91 (2nd Cir. 1993), *cert. denied*, 114 S.Ct. 1187 (1994); *Hale v. Arizona*, 993 F.2d 1387, 1391-92 (9th Cir.) (en banc), *cert. denied*, 114 S.Ct. 386 (1993). Furthermore, the Court notes that the FLSA definition of "employer" and enforcement provisions at issue are substantially similar to those set forth in the Age Discrimination in Employment Act, in which context the Seventh Circuit held such provisions to evidence Congress' clear "desire to override the states' sovereign immunity." *Davidson v. Board of Governors of State Colleges & Universities*, 920 F.2d 441, 443 (7th Cir. 1990).

clearly intended to abrogate the States' sovereign immunity from suit through the Equal Pay Act, and the portion of Defendants' Motion to Dismiss which requests dismissal of all claims based on the Equal Pay Act must be denied.

B. Claims for Monetary Damages

In their Objections to the Report & Recommendation, Defendants also raise the new argument that Plaintiffs' claims for monetary damages under § 1981a are barred by the Eleventh Amendment. Defendants contend that § 1981a contains no indication of any intent to abrogate sovereign immunity with respect to claims for compensatory and punitive damages, failing to satisfy the *Seminole Tribe* standard for abrogation of Eleventh Amendment immunity.

With respect to Plaintiffs' claims for punitive damages, the Court agrees with Defendants' position. Under § 1981a, governments, governmental agencies or political subdivisions are expressly excluded from liability for punitive damages. 42 U.S.C. § 1981a(b)(1). This interpretation is further supported by the relevant legislative history, which reveals that the purpose of the language in § 1981a was to establish that punitive damages are not available against state and local government defendants. *See* 137 Cong. Rec. S15445-02, S15460, S15472-01, S15484, H950501, H9527 (1991). Thus, the Court finds that Congress made no unequivocal expression of intent to abrogate the states' sovereign immunity with respect to punitive damages in enacting § 1981a, and the standard set forth in *Seminole Tribe* for a valid abrogation of sovereign immunity has not been satisfied. Accordingly, the portion of Plaintiffs' claims in Counts III and IV of the First Amended Complaint seeking punitive damages pursuant to § 1981a are barred, and Defendants' Motion to Dismiss will be granted in this respect.

Defendants also urge the Court to adopt their myopic view with respect to Plaintiffs' claim for compensatory damages and find no indication of Congressional intent in § 1981a itself. However, in considering the availability of compensatory damages, the Court finds that the appropriate analysis must reach further. It is clear that Title VII permits recovery of front pay, back pay, and other equitable relief against employers who violate its provisions but does not, as enacted, provide an avenue of relief with respect to monetary damages. *See* 42 U.S.C. § 2000e *et seq.* However, in 1991, Congress passed § 1981a to expand the remedies available to successful Title VII plaintiffs to include compensatory damages. *Blankenship v. Warren County, Virginia*, 931 F.Supp. 447, 450 (W.D.Va. 1996), *citing* H.R.Rep. No. 40(l), 102d Cong., 1st Sess. 65, 71 (1991), 1991 U.S.C.C.A.N. 549. While § 1981a does not technically amend Title VII but, rather, stands alone as a separate statutory provision, this is not dispositive. To the contrary, the Court concurs with the district court in *Blankenship* that an examination of § 1981a necessarily involves reference to the definitional and enforcement provisions of Title VII.

Section 1981a provides:

> In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 . . . against a respondent who engaged in unlawful intentional discrimination . . . prohibited under section 703, 704, or 717 of the Act . . . and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in additional to any relief authorized by section 706(g) of the Civil Rights Act of 1964 . . . from the respondent.

42 U.S.C. § 1981a(a)(1). Although a complaining party includes "a person who may bring an action or proceeding under Title VII

of the Civil Rights Act of 1964," 42 U.S.C. § 1981a(d)(1)(A), the term "respondent" is not defined by § 1981a. However, by its own terms, § 1981a looks to § 2000e to give meaning to its provisions. *Sattar v. Unocal Corp.*, 829 F.Supp. 331, 333 n.3 (N.D.Cal. 1993).

> To determine who qualifies as a respondent, one has no recourse but to look to § 2000e-5(b), which defines "respondent" as, *inter alia*, an "employer." . . . [I]t is beyond cavil that employers under Title VII include state employers. Therefore, § 1981a, which permits suits against respondents, allows suits against state employers as well.

Blankenship, 931 F.2d at 450. In other words, the term " '[r]espondent' can only be interpreted by reference to § 2000e and, thus, to the use of the word 'employer'." *Sattar*, 829 F.Supp. at 333 n.3.

Thus, the Court finds that by including the references to Title VII in the text of § 1981a and failing to provide an alternative definition, Congress expressed its intent that Title VII supply the definition of "respondent" for purposes of assessing liability under § 1981a. This, in combination with the other overt references to Title VII's enforcement and definitional provisions in the text of § 1981a, evidences Congress' intent in enacting § 1981a to supplement the remedies available under Title VII and expand its prior abrogation of the states' sovereign immunity. Furthermore, the legislative history of § 1981a evidences Congress' understanding that the provisions concerning compensatory damages would apply to the states. *See* 137 Cong. Rec. H9505-01, H9527 (1991) ("By reference to sections 703, 704 and 706 of Title VII, the statutory language of section [1981a] is explicit that compensatory damages are available against state and local governmental defendants . . . ."); 137 Cong. Rec. S15472-01, S15484 (1991) ("[C]ompensatory damages may be awarded against federal, state and local government

agencies . . . ."). Accordingly, in applying the first step of the two-part analysis set forth in *Seminole Tribe*, the Court concludes that Congress has provided a clear statement of its intent to subject states to claims for compensatory damages pursuant to § 1981a in federal court.

The second part of the *Seminole Tribe* analysis requires that Congress act "pursuant to a valid exercise of power" in attempting to abrogate sovereign immunity. 116 S.Ct. at 1123. In enacting § 1981a, Congress sought to expand the remedies available to plaintiffs in Title VII actions. The Supreme Court has held that Title VII constitutes a valid abrogation of the states' Eleventh Amendment immunity because Congress acted in furtherance of the Fourteenth Amendment, "which operated to alter the pre-existing balance between state and federal power achieved by Article III and the Eleventh Amendment." *Seminole Tribe*, 116 S.Ct. at 1128; *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S.Ct. 2666 (1976). Like Title VII, § 1981a provides additional remedies against discrimination in the workplace on account of sex, and Defendants cannot reasonably argue that Congress lacks power to provide remedies for discrimination under § 5 of the Fourteenth Amendment. As such, the Court finds that § 1981a is an anti-discrimination measure that may be viewed as an exercise of Congress' power to adopt legislation enforcing the Fourteenth Amendment's guarantee of equal protection of the law. Therefore, under *Seminole Tribe*, sovereign immunity would not insulate the State of Illinois from suit for compensatory damages pursuant to § 1981a, and Defendants' Motion to Dismiss 1 must be denied with respect to Plaintiffs' claims for compensatory damages in Counts III and IV.

II. Motion to Dismiss 2—Individual Liability

A. Equal Pay Act Claims

Defendants assert that the Equal Pay Act does not permit suits against defendants in their individual capacities. Although the Seventh Circuit has found that an individual employee may be named in lieu of the employer in an Equal Pay Act claim, *Riordan v. Kempiners*, 831 F.2d 690, 694 (7th Cir. 1987), the Court of Appeals did not decide the precise issue of whether an individual employee may be named in addition to the employing entity in this context. However, this issue has been addressed by other district courts in this circuit. In *Pommier v. James L. Edelstein Enterprises*, the Honorable Marvin E. Aspen held that the definition of the term "employer" as used in both the Equal Pay Act and Title VII is "identical," and case law in the Title VII area directs that an individual supervisor cannot be held personally liable for Equal Pay Act violations made as agent of the employer. 816 F.Supp. 476, 481 (N.D.III. 1993), *citing Weiss v. Coca-Cola Bottling Co. of Chicago*, 772 F.Supp. 407, 412 (N.D.III. 1991). The district judge in *Weiss* likewise concluded that allegations against an individual regarding actions that were taken as an agent of the employer cannot result in individual liability. 772 F.Supp. at 412. *See also Jaskowski v. Rodman & Renshaw, Inc.*, 842 F.Supp. 1094, 1098 (N.D.III. 1994) (recognizing that neither Title VII nor the Equal Pay Act permits suits against individuals.)[4]

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[4] The Court also notes that although the decisions in *Witham v. Regency Savings Bank*, 1995 WL 723888 (N.D.III. December 5, 1995), and *Equal Employment Opportunity Commission v. Home by Hemphill. Inc.*, 1995 WL 683502 (N.D.III, November 16, 1995), technically allow allegations of individual liability under the Equal Pay Act to survive a motion to dismiss, the Court finds these opinions unpersuasive. In *Witham*, the Honorable Milton I. Shadur expressly stated that the court would be willing to entertain a motion for dismissal of the individual claim that was "properly supported by persuasive authority." 1995 WL 723888 at *1. Similarly, although leave to replead was

Whereas the Equal Pay Act derives its definition of "employer" from the Fair Labor Standards Act and "includes *any person acting directly or indirectly in the interest of an employer* in relation to an employee and includes a public agency," 29 U.S.C. § 203(d) (emphasis added), "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and *any agent of such a person*" is an employer under Title VII. 42 U.S.C. § 2000e(b) (emphasis added). Although this Court does not agree that the definitions of "employer" in Title VII and the Equal Pay Act are identical, the definitions may be functionally equivalent as applied. Furthermore, the remedies available under the applicable sections of the Equal Pay Act include unpaid minimum wages or unpaid overtime compensation, liquidated damages, reinstatement, and promotion. 29 U.S.C. § 216(b). Like the remedies available under Title VII, these are remedies which are more likely provided by an employer rather than an individual, and the language of the Equal Pay Act uses the term "employer" in the context of the entity paying the disparate wages. 29 U.S.C. §§ 216(b), 206(d)(1).

Additionally, the Court's review of the First Amended Complaint reveals that Plaintiffs' allegations against the named Defendants are directed toward actions purportedly taken by these persons in their capacities as agents for Illinois State University. Plaintiffs do not allege that any of these persons was acting outside the scope of their official capacities at the time they engaged in violations of the Equal Pay Act. Thus, there does not appear to be a basis for imposing personal liability against these individuals. Accordingly, this aspect of the Report & Recommendation is rejected, and Plaintiffs' claims against Defendants in their individual capacities are dismissed from Counts I and II.

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granted, the decision in *Hemphill* actually dismissed the claim of individual liability as insufficient. 1995 WL 683502 at *3.

B. Title VII Claims

In the Motion to Dismiss 2, Defendants also contend that they cannot be sued in their individual capacities for violations of Title VII and ask that Plaintiffs' claims in this regard be dismissed. In the Report & Recommendation, the Magistrate Judge concurs and recommends that Defendants' Motion to Dismiss the Title VII claims against the individuals in Counts III and IV, be granted. However, this Court's review of the Amended Complaint reveals that Counts III and IV, as amended, do not state any claim against Defendants in their individual capacities. Accordingly, the Court rejects this portion of the Report & Recommendation. This aspect of Motion to Dismiss 2 will be denied as moot.

CONCLUSION

For the reasons set forth herein, the Report & Recommendation is ADOPTED in part and REJECTED in part. Defendants' Motion to Dismiss [#71] is GRANTED IN PART and DENIED IN PART, and Defendants' Motion to Dismiss [#18] is GRANTED IN PART and DENIED IN PART AS MOOT. The previously imposed stay is now lifted, and this matter is referred to Magistrate Judge Kauffman for further proceedings.

ENTERED this 30th day of July, 1997.

Michael M. Mihm

MICHAEL M. MIHM
Chief United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF ILLINOIS

DR. IRIS VARNER, *et al*
Plaintiff

vs.

ILLINOIS STATE UNIVERSITY, *et al*
Defendants

Case No. 95-1355

FILED

MAY 22 1997

JOHN M. WATERS, Clerk
U.S. District Court
Central District of Illinois

REPORT AND RECOMMENDATION

Now before the court are the defendants' Motions to Dismiss (#18 and #71), which were revived by motion following the filing of Plaintiffs' First Amended Complaint. The motions are fully briefed, and oral arguments were heard on February 27. Pursuant to Local Rule 72.1, the district judge has referred the matter to me for a report and recommendation. After carefully considering all of the submissions of the parties, and pursuant to 28 U.S.C. §636(b)(1)(B), I recommend that the motions be granted in part and denied in part.

PROCEDURAL BACKGROUND

Plaintiffs Iris Varner, Teresa Palmer, and Paula Pomerenke, on behalf of themselves and a certified class, allege that defendants have violated the Equal Pay Act of 1963, Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991 (§1981), and the Civil Rights Act of 1871 (§1983).

Plaintiffs are all tenure track faculty at Illinois State University. Defendants are Illinois State University, four officials of the University, and members of the Board of Regents and its successor Board of Trustees in their official capacities. (The caption of the complaint indicates that these individuals are sued in both individual and official capacities. However, the body of the complaint reveals that relief is sought against the individuals in their official capacities only.)

The complaint was originally filed in the Northern District of Illinois. Upon a Motion to Dismiss or Transfer, Judge Zagel granted the motion to transfer and denied the motion to dismiss. A second motion to dismiss, filed after transfer to this court, was granted in part and denied in part by Judge Mihm, after which plaintiffs filed the First Amended Complaint.

The First Amended Complaint consists of five counts. Counts I and II, against the University and the board members in their official capacities, allege sex discrimination and retaliation in violation of the Equal Pay Act. Counts III and IV are also against the University and members of the board in their official capacities; these Counts claim violations of Title VII and §1981. Count V alleges a violation of §1983 against the individual defendants in their official capacity. After the amended complaint was filed, Defendants moved to revive the previous motions as they related to the amended complaint, a motion that was allowed.

Because one of the issues raised in the second motion to dismiss was the constitutionality of the two statutes at issue, the United States Attorney General was notified. Although the United States subsequently declined to intervene, the Attorney General requested that the court consider briefs on the same issue that had been filed in another case currently pending in this court.

The constitutional issue raised is whether Congress properly abrogated State immunity from Equal Pay Act liability under the Eleventh Amendment and *Seminole Tribe of Florida v. Florida,* U.S., 116 S. Ct. 1114, 134 L.Ed.2d 252 (1996). In an Order dated September 24, 1996, resolving the second motion to dismiss, Judge Mihm ruled that Congress had properly abrogated Illinois' sovereign immunity and that the State was not insulated from suit under the Equal Pay Act. Because this issue has been resolved in this case by the District Judge, I decline to reconsider the issue, believing the Order to constitute law of the case. To the extent the defendants had wished to revive this portion of the earlier motions, they may take up the Eleventh Amendment issues in objections to this Report and Recommendation.

The other issue raised is whether suit against the individual defendants is proper. That issue will be addressed in this Report and Recommendation.

MOTIONS TO DISMISS

A complaint should not be dismissed unless it appears from the pleadings that the plaintiff could prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41 (1957); *Gould v. Artisoft, Inc.*, 1 F.3d 544, 548 (7th Cir. 1993). Rather, it should be construed broadly and liberally in conformity with the mandate in Rule 8(f).

For purposes of a motion to dismiss, the complaint is construed in the light most favorable to the plaintiff; its well-pleaded factual

allegations are taken as true, and all reasonably-drawn inferences are drawn in favor of the plaintiff. *Albright v. Oliver*, 510 U.S. 266, 268 (1994); *Hishon v. King*, 467 U.S. 69 (1984); *Scheuer v. Rhodes*, 416 U.S. 232 (1974); *MCM Partners v. Andrews-Bartlett & Assoc., Inc.*, 62 F.3d 967, 969 (7th Cir. 1995); *Early v. Bankers Life & Cas. Co.*, 959 F.2d 75 (7th Cir. 1992); *Yeksigean v. Nappi*, 900 F.2d 101 (7th Cir. 1990). In addition, a complaint must contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory. *Sutliff, Inc. v. Donovan Cos.*, 727 F.2d 648 (7th Cir. 1984). If the plaintiff's claim as plead is "without legal consequence," dismissal is proper; *Grzan v. Charter Hospital*, 104 F.3d 116, 119 (7th Cir. 1997).

DISCUSSION

A. Individual liability under the Equal Pay Act

The Equal Pay Act, 29 U.S.C. §206(d) (EPA), is part of the Fair Labor Standards Act (FLSA). The latter statute defines "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency . . ." 29 U.S.C. §203(d). "Public agency" means "the government of a State or political subdivision thereof; any agency of . . . a State, or a political subdivisions of a State." 29 U.S.C. §203(x). "Person" includes "an individual." 29 U.S.C. §203(a).

There are cases discussing individual liability under the EPA but this is an issue not yet addressed by the Supreme Court. The Seventh Circuit has mentioned it in dicta, *Riordan v. Kempiners*, 831 F.2d 690, 694-5 (7th Cir. 1987), but that reference seems to cut against defendants' position:

> For reasons unclear to us, [plaintiff's] lawyer decided to name . . . the director of the Department [] as the only

> defendant to her suit under the Equal Pay Act. The word "employer" is defined broadly enough in the Fair Labor Standards Act (of which the Equal Pay Act is an amendment) to permit naming another employee rather than the employer as defendant, provided the defendant had supervisory authority over the complaining employee and was responsible in whole or part for the alleged violation.

Id. at 694.

The Northern District of Illinois has ruled on the issue directly several times with inconsistent results. *See, Jaskowski v. Rodman & Renshaw, Inc.*, 842 F.Supp. 1094, 1098 (N.D.Ill. 1994) (finding individual liability under EPA); *Pommier v. James L. Edelstein Enter.*, 816 F.Supp. 476 (N.D.Ill. 1993) (same); and *Weiss v. Coca-Cola Bottling Co.*, 772 F.Supp. 407 (N.D.Ill. 1991) (same); *but see, EEOC v. Home by Hemphill, Inc.*, No. 95 C1138, 1995 WL 683502 (N.D.Ill. Nov. 16, 1995) (rejecting individual liability under EPA); and *Witham v. Regency Savings Bank*, 1995 WL 680313 (N.D.Ill. Nov. 13, 1995) (same). *See also, Bergstrom v. Univ. of New Hampshire*, 943 F.Supp. 130 (D.N.H.1996) (rejecting individual liability and criticizing *Pommier* as "thinly reasoned" and based in part on the erroneous conclusion that "employer" is defined identically in the EPA and Title VII). *Cf., Freemon v. Foley*, 911 F.Supp. 326 (N.D.Ill. 1995) (finding individual liability under Family and Medical Leave Act, which adopts definition of "employer" from FLSA).

In my opinion, the definition of "employer" in the FLSA clearly and unambiguously includes individuals. The cases cited above that have concluded differently have, as the New Hampshire court pointed out, simply assumed that the statutory definition is the same as is contained in Title VII and other employment statutes. It is not. Under the EPA, an individual may be held liable.

However, that conclusion does not mean that all individual co-employees, supervisors, officers and board members are accountable under the EPA. To determine if any "person" is an employer, courts look to such factors as the powers to hire and fire, to supervise and control work schedules or conditions of employment, to set rate and method of payment, and to maintain employment records. See, *Keenan v. Allan*, 889 F.Supp. 1320 (E.D.Wash. 1995), *aff'd.* 91 F.3d 1275. *Accord, Brock v. Hamad*, 867 F.2d 804 (4th Cir. 1989) (power to hire and direct employees); *U.S. Dept of Labor v. Cole Enter., Inc.*, 62 F.3d 775 (6th Cir. 1995) (CEO with significant ownership interest, significant control of business operation, power to determine salaries and to make hiring decisions is employer). These powers need not be exclusively exercised by the "person" who has been sued. *Freemon*, 911 F.Supp. 326; *Reich v. Cole Enter., Inc.*, 901 F.Supp. 255 (S.D.Ohio 1993) *aff'd,* 62 F.3d 775. If a director or officer has sufficient control over the entity that his decisions determine if a violation of the FLSA occurred, then the FLSA considers that "person" to be the "employer." *Dole v. Simpson*, 784 F.Supp. 538 (N.D.Ind.1991).

I believe the plaintiff's First Amended Complaint contains sufficient allegations to withstand a motion to dismiss. It may or may not be possible for plaintiff to develop evidence as to each of these individuals sufficient to withstand summary judgment, but that is an issue for another day. I recommend that the motion to dismiss the EPA claims against the individual defendants be denied.

B. Individual Liability under Title VII as amended

In *Williams v. Banning,* 72 F.3d 552 (7th Cir. 1995), the Seventh Circuit clearly held that there is no Title VII liability for individuals, unless the individual meets the statutory definition of "employer" independently of the entity. Otherwise, under Title VII, only the entity that is the employer is subject to suit.

Accord, Geier v. Medtronic, Inc., 99 F.3d 238 (7th Cir. 1996) (supervisor does not fall within Title VII definition of employer); *Bryson v. Chicago State Univ.*, 96 F.3d 912 (7th Cir. 1996) (in sexual harassment Title VII suit in which supervisor was sued in official capacity, proper defendant was University not supervisor; summary judgment for supervisor affirmed).

The individuals named as defendants in this suit are not "employers." *See, Feltner v. Partyka*, 945 F.Supp.1188 (N.D.Ill.1996) (owners of company not "employers"); *Fernandez v. Wolff*, 919 F.Supp. 1120 (N.D.Ill. 1996) (university president and dean not "employers"); *Vakharia v. Little Company of Mary Hosp.*, 917 F.Supp. 1282 (N.D.Ill. 1996) (hospital officers not "employers"); *Whitechurch v. Apache Products Co.*, 916 F.Supp. 809 (N.D.Ill. 1996) (CEO not "employer"); *Briggs v. North Shore Sanitary Dist.*, 914 F.Supp.245 (N.D.Ill. 1996) (board of trustees member not "employer"). They are therefore not subject to suit under Title VII.

For this reason, I recommend that defendants' motion to dismiss the Title VII claims against the individuals in Counts III and IV be granted.

C. Conclusion

For the reasons stated above, I recommend that defendants' motion be granted as to the Title VII claims asserted in Counts III and IV and denied as to all other issues. Plaintiff should be directed to file an amended complaint. The parties are advised that any objection to this Report and Recommendation must be filed in writing with the Clerk within ten (10) working days after service of this Report and Recommendation. Fed.R.Civ.P.72(b); 29 U.S.C.636(b)(1). Failure to object will constitute a waiver of objections on appeal. *Video Views Inc. V. Studio 21, Ltd.*, 797 F.2d 538 (7th Cir. 1986).

ENTER this 22nd day of May, 1997.

ROBERT J. KAUFFMAN
United States Magistrate Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF ILLINOIS

DR. IRIS I. VARNER, DR. TERESA M. PALMER, and DR. PAULA J. POMERENKE, on their own behalf and on behalf of all others similarly situated,

Plaintiffs,

v.

ILLINOIS STATE UNIVERSITY; ROBERT W. JEFFERSON, Dean; DAVID STRAND, Provost; JOHN K. URICE, Vice President and Provost; THOMAS P. WALLACE, President; the Board of Regents; including DAVID T. MURPHY; CAROL K. BURNS; JOSEPH B. EBBESEN; CARL E. KASTEN; NANCY J. MASTERSON; PATRICIA A. MCKENZIE; JAMES W. MYLES; BARBARA SCHEIBLING; NIRANJAN SHAH; and WILLIAM SULASKI, individually and in their capacity as members of the Board of Regents,

Defendants.

Case No. 95-1355

FILED

SEP 24 1996

JOHN M. WATERS, Clerk
U.S. DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

ORDER

This matter is before the Court on Defendants' Motion to Dismiss [#71] and Plaintiffs' Motion to Vacate Prior Order and for Extension of Time [#81]. For the reasons set forth below, the Defendants' Motion is GRANTED in part and DENIED in part, and Plaintiffs' Motion is DENIED.

Background

On March 13, 1995, three female professors employed at Illinois State University ("the University"), Dr. Iris I. Varner, Dr. Teresa M. Palmer, and Dr. Paula J. Pomerenke, filed a Complaint against Illinois State University, four officials of Illinois State University, the Board of Regents, and the ten members of the board. The Complaint has been certified, as a class action on behalf of any female teaching faculty at Illinois State University who was an Assistant Professor, Associate Professor, or full Professor anytime during the period beginning with the 1982-1983 academic year up to and including the present.

The named Plaintiffs have been employed by the University as teaching faculty (in the case of one Plaintiff since 1969). Drs. Varner, Palmer, and Pomerenke allege that from the dates of their respective employment, they have been paid less than their male counterparts, given considerations of teaching experience, the number of classes and class size they taught, academic papers published, service to the University, and other matters to go to the quality of their services. The Complaint further alleges that the Defendants engaged in retaliation against female professors who complained of the Defendants' alleged employment practices.

Jurisdiction

Plaintiffs brought this suit pursuant to the Equal Pay Act, 29 U.S.C. § 201, *et seq.*; Title VII of the Civil Rights Act, 42 U.S.C. § 2000, *et seq.*; and the Civil Rights Act of 1991, 42 U.S.C. § 1981, *et seq.* This Court has jurisdiction of this action pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000, *et seq.*; the Equal Pay Act of 1963, 29 U.S.C. § 201, *et seq.*; and the Civil Rights Act of 1991, 42 U.S.C. § 1981, *et seq.*

Discussion

In resolving a motion to dismiss, this Court must consider all well-pled facts as true and must draw all inferences in favor of the non-moving party. *Bontkowski v. First Nat. Bank of Cicero*, 998 F.2d 459, 461 (7th Cir.), *cert. denied*, 114 S.Ct. 602 (1993). In ruling on a motion to dismiss, courts consider whether relief is possible under any set of facts that could be established consistent with the allegations in the Complaint. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). This Court will dismiss a claim only if it is beyond doubt that no set of facts would entitle the Plaintiffs to relief. *Venture Associates Corp. v. Zenith Data Systems Corp.*, 987 F.2d 429, 432 (7th Cir. 1993).

On August 14, 1996, Defendants filed a Motion to Dismiss, to which Plaintiffs filed a Response instanter on September 10, 1996. In support of their Motion to Dismiss, Defendants make the following arguments: (1) By adding a Defendant, Plaintiffs have amended the pleadings and should file an amended complaint; and (2) Plaintiffs cannot proceed in federal court on any claims based on the Equal Pay Act because the State of Illinois has not consented to suit. Each of these arguments will be addressed in turn.

John Urice ("Urice") was initially named as a Defendant in this case. However, Judge James B. Zagel of the Northern

District of Illinois dismissed Urice in an Order dated August 18, 1995 because Urice was not alleged to have participated in the basic claims of gender discrimination and had been sued in his individual capacity. Plaintiffs then filed a related suit making similar allegations against Urice, Case No. 96-1355. On July 15, 1996, Plaintiffs filed a Motion before this Court to add Urice as a Defendant once again. The Court granted Plaintiffs' Motion on July 26, 1996, stating that Urice was to be added as a named Defendant in this case, and Plaintiffs were to submit a voluntary dismissal regarding the related case against Urice. To date, Plaintiffs have taken no steps to implement this Court's Order.

Plaintiffs have not only failed to file an amended complaint adding Urice to the present case, but they have also failed to dismiss the related action. Rather, Plaintiffs state that they are exercising "an abundance of caution" and have moved to vacate the order they requested adding Urice as a Defendant in order "to keep the Title VII and § 1981 claims presented in 96-1355 separate from the issues raised by Defendants under the Equal Pay Act." (Plaintiffs' Resp. to Mot. to Dismiss at 2.) Plaintiffs have presented no logical or practical reason why two separate suits should be conducted based on the same set of facts and similar issues. Accordingly, Plaintiffs' Motion to Vacate Prior order is denied.

Defendants argue that adding a party generally requires an amendment to the Complaint. In the present case, they claim that the addition of Urice as a Defendant requires Plaintiffs to file an amended complaint because there are no allegations currently pending against him as a result of Judge Zagel's previous Order dismissing Urice from the case. Thus, without an amended complaint, Defendants claim that it is not currently possible to determine what allegations are pending against Urice.

While notice pleading may not require a plaintiff to plead in great detail, Rule 8 does require sufficient clarity to determine that "the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2).

> The primary purpose of these provisions is rooted in fair notice: Under Rule 8, a complaint "must be presented with intelligibility sufficient for a court or opposing party to understand whether a valid claim is alleged and if so what it is."

Vicom, Inc. v. Harbridge Merchant Services, Inc., 20 F.3d, 771, 775 (7th Cir. 1994) (citations omitted). The Court also noted that a properly pled complaint allows the defendant to formulate an answer. *Id.* at 776. Additionally, "[w]here an amendment of pleadings is necessary for purposes of clarity or otherwise, after parties have been added, the complaint should be amended." *Fair Housing Development Fund Corp. v. Burke*, 55 F.R.D. 414, 415 (D.C.N.Y. 1972) (quoting *Bartels v. Sperti, Inc.*, 73 F.Supp. 751 (S.D.N.Y. 1947)).

The Court granted Plaintiffs' Motion to add Urice as a Defendant with the understanding that the claims raised in the related case were similar to those raised in the present case and involved the same set of basic facts. In doing so, the Court sought to eliminate unnecessary duplication and maximize judicial efficiency. However, Plaintiffs have not amended their Complaint to add Urice. Based on Judge Zagel's previous dismissal of Urice from this case, principles of res judicata prevent Urice from being called upon once again to answer the same Complaint. To the extent that Defendants' Motion requests that the entire suit be dismissed on these grounds, that portion of the Motion to Dismiss is denied. Nevertheless, the portion of Defendants' Motion to Dismiss requesting that Urice be dismissed for failure to file an amended complaint stating any allegations against Urice is granted. Plaintiffs have 21 days to file an Amended Complaint in this case including allegations against Urice and to voluntarily

dismiss the related suit, Case No. 96-1355, in compliance with this Court's July 26, 1996 Order.

Defendants ask the Court to confirm that Urice, like the other Defendants in the case, may only be sued in his official capacity. Judge Zagel's August 18, 1995 Order held that Title VII did not permit suits against supervisory employees and dismissed all claims against Defendants in their individual capacities. However, Judge Zagel refused to dismiss claims against Defendants in their individual capacities with respect to the Equal Pay Act claims, with the exception of Urice. Thus, with respect to Title VII claims, Urice, like the other Defendants, may only be sued in his official capacity, but no such restriction would apply with respect to Equal Pay Act claims or other claims that may be made against Urice in the Amended Complaint.

In their Motion to Dismiss, Defendants also allege that any claims based on the Equal Pay Act or other parts of the Fair Labor Standards Act should be dismissed because the State of Illinois has not consented to suit in federal court and such a suit therefore is prohibited by the Eleventh Amendment. Defendants cite *Seminole Tribe of Florida v. Florida*, U.S. , 116 S.Ct. 1114 (1996), for the proposition that this Court lacks jurisdiction over these claims because Congress did not expressly waive the sovereign immunity afforded by the Eleventh Amendment to the United States Constitution.

In *Seminole Tribe*, the Court examined a provision of the Indian Gaming Regulatory Act ("the Act"), 25 U.S.C. § 2710(d)(3)(A), which requires that States negotiate in good faith with Indian tribes. The Act authorizes an Indian tribe to sue a State for breaching the duty to negotiate in good faith. 25 U.S.C. § 2710(d)(7). The Court found that Congress did not have the authority to waive Eleventh Amendment immunity under the Indian Commerce Clause and, therefore, federal courts do not have jurisdiction to hear cases arising under the Act

because the State had not consented to suit. *Seminole Tribe*, 116 S.Ct. at 1132-33.

Prior to the expansive view of sovereign immunity expressed in *Seminole Tribe*, the Supreme Court had recognized congressional authority to abrogate a state's sovereign immunity when legislation was enacted pursuant to either § 5 of the Fourteenth Amendment or the Interstate Commerce Clause, based on *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S.Ct. 2666 (1976), and *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 109 S.Ct. 2273 (1989), respectively. *Seminole Tribe*, 116 S.Ct. at 1125. The Court overruled its prior holding in *Union Gas*, stating that "both the result in *Union Gas* and the plurality's rationale depart from our established understanding of the Eleventh Amendment and undermine the accepted function of Article III." *Id.* The Court found that Congress could not overcome the jurisdictional bar of the Eleventh Amendment when legislating pursuant to the Interstate Commerce Clause because "Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction" by Article III. *Id.* at 1132. However, the Court did not disturb its prior decisions with respect to legislation enacted pursuant to the Fourteenth Amendment, "which operated to alter the pre-existing balance between state and federal power achieved by Article III and the Eleventh Amendment." *Id.* at 1128. Thus, in the wake of *Seminole Tribe*, the only source of congressional authority capable of abrogating sovereign immunity under the Eleventh Amendment that has been recognized by the Supreme Court is legislation enacted pursuant to § 5 of the Fourteenth Amendment.

As noted by the Defendants, the Equal Pay Act is part of the Fair Labor Standards Act of 1938 ("FLSA"). Congress expressly

stated that it was enacting the FLSA pursuant to its power under the Commerce Clause:

> It is declared to be the policy of this chapter, through the exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industies [sic] without substantially curtailing employment or earning power.

29 U.S.C. § 202(b); *see also Marshall v. City of Sheboygan*, 577 F.2d 1, 6 (7th Cir. 1978) (finding that the Equal Pay Act is a valid exercise of Congress' power under the Commerce Clause).

Plaintiffs admit that the FLSA was enacted pursuant to Congress' power under the Commerce Clause but argue that the portion of the FLSA constituting the Equal Pay Act was enacted in furtherance of the equal protection clause of the Fourteenth Amendment and therefore should be undisturbed by *Seminole Tribe*, citing *Marshall v. Owensboro-Daviess County Hospital*, 581 F.2d 116 (6th Cir. 1978), in support of this position. In *Marshall*, the Sixth Circuit found that the Equal Pay Act amendments to the FLSA were authorized by § 5 of the Fourteenth Amendment. *Id.* at 119 (quoting *Usery v. Allegheny County Institution Dist.*, 544 F.2d 148 (3rd Cir. 1976), *cert. denied*, 430 U.S. 946, 97 S.Ct. 1582 (1977), and *Usery v. Charleston County School Dist.*, 558 F.2d 1169 (4th Cir. 1977).

In *Allegheny County*, the Third Circuit rejected the proposition that because the Equal Pay Act is housed within the FLSA and uses its administrative and enforcement mechanisms, it is necessarily a Commerce Clause enactment. 544 F.2d at 155. Rather, "the Equal Pay Act is a separate law, enacted at a different time, and aimed at a separate problem—discrimination on account of sex in the payment of wages" and "Congress has § 5 fourteenth amendment power to prohibit sex discrimination."

Id. The Fourth Circuit adopted this view in *Charleston County* adding that, unlike the other provisions of the FLSA:

> [T]he Equal Pay Act is an anti-discrimination measure; and, as such, may be viewed as an exercise of Congress' power to adopt legislation enforcing the Fourteenth Amendment's guarantee of equal protection of the law.

558 F.2d at 1170.

The Seventh Circuit has adopted analogous reasoning with respect to the Age Discrimination in Employment Act ("ADEA"), which was also amended to authorize suits against state, and local governments. *Equal Employment Opportunity Commission v. Elrod*, 674 F.2d 601 (7th Cir. 1982). In *Elrod*, the Seventh Circuit set forth the test for determining whether legislation is enacted pursuant to § 5 of the Fourteenth Amendment as "whether the *objectives* of the legislation are 'within Congress' power under the amendment." 674 F.2d at 608 (emphasis in original).

The Seventh Circuit found that despite the fact that the ADEA was enacted pursuant to the Commerce Clause, it was also a valid exercise of Congress' power under the Fourteenth Amendment. *Id.* at 603; *see also, Davidson v. Board of Governors of State Colleges*, 920 F.2d 441, 443 (7th Cir. 1990). Prohibiting arbitrary or discriminatory government conduct is the "very essence" of the guarantee of equal protection under the Fourteenth Amendment. *Elrod*, 674 F.2d at 604. This reasoning is also consistent with the reasoning of the Supreme Court with regard to Title VII in *Fitzpatrick*, which was affirmed in *Seminole Tribe.* 116 S.Ct. at 1125, 1128.

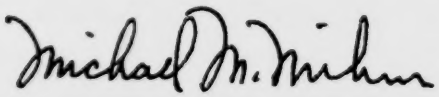
In light of the Seventh Circuit's reasoning in connection with the ADEA cases, this Court agrees with the position taken by the Third, Fourth, and Sixth Circuits that the portion of the FLSA constituting the Equal Pay Act was enacted to prohibit

discrimination in pay based on sex in furtherance of the equal protection clause of the Fourteenth Amendment. Therefore, sovereign immunity would not insulate the State of Illinois from suit under *Seminole Tribe*. Accordingly, the portion of Defendants' Motion requesting dismissal of all claims based on the Equal Pay Act is denied.

CONCLUSION

For the reasons set forth herein, the portion of Defendants' Motion to Dismiss [#71] requesting dismissal with leave to file an amended complaint adding Urice as a defendant is GRANTED and the portion requesting dismissal of the Equal Pay Act claims is DENIED. Plaintiffs' Motion to Vacate Prior Order and for Extension of Time [#81] is DENIED. Plaintiffs have 21 days to file an Amended Complaint in this case including allegations against Urice and to voluntarily dismiss the related suit, Case No. 96-1355. This case is referred to Magistrate Judge Robert J. Kauffman.

ENTERED this 24th day of September, 1996.



MICHAEL M. MIHM
Chief United States District Judge

FAIR LABOR STANDARDS ACT

29 U.S.C. §§ 201, *et seq.*

§ 203. Definitions

As used in this chapter—

* * * * *

(e)(1) Except as provided in paragraphs (2), (3), and (4) the term "employee" means any individual employed by an employer.

(2) In the case of an individual employed by a public agency, such term means—

(A) any individual employed by the Government of the United States—

(i) as a civilian in the military departments (as defined in section 102 of Title 5),

(ii) in any executive agency (as defined in section 105 of such title),

(iii) in any unit of the judicial branch of the Government which has positions in the competitive service,

(iv) in a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces,

(v) in the Library of Congress, or

(vi) the Government Printing Office;

(B) any individual employed by the United States Postal Service or the Postal Rate Commission; and

(C) any individual employed by a State, political subdivision of a State, or an interstate governmental agency, other than such an individual—

(i) who is not subject to the civil service laws of the State, political subdivision, or agency which employs him; and

(ii) who—

(I) holds a public elective office of that State, political subdivision, or agency,

(II) is selected by the holder of such an office to be a member of his personal staff,

(III) is appointed by such an officeholder to serve on a policymaking level,

(IV) is an immediate advisor to such an officeholder with respect to the constitutional or legal powers of his office, or

(V) is an employee in the legislative branch or legislative body of that State, political subdivision, or agency and is not employed by the legislative library of such State, political subdivision, or agency.

* * * * *

(x) "Public agency" means the Government of the United States; the government of a State or political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Rate Commission), a State, or a political subdivision of a State; or any interstate governmental agency.

§ 206. Minimum Wage

* * * * *

Prohibition of sex discrimination

(d)(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

§ 216. Penalties

* * * * *

(b) Damages; right of action; attorney's fees and costs; termination of right of action

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of

this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

CONSTITUTION
OF THE
STATE OF ILLINOIS

Date Effective

Adopted at Special Election on December 15, 1970

General Effective July 1, 1971

ARTICLE I. BILL OF RIGHTS

§ 18. No Discrimination on the Basis of Sex

The equal protection of the laws shall not be denied or abridged on account of sex by the State or its units of local government and school districts.

CHAPTER 775

HUMAN RIGHTS

ACT 5. ILLINOIS HUMAN RIGHTS ACT

ARTICLE 1. TITLE, POLICY AND DEFINITIONS

775 ILCS 5/1-101

5/1-101. Short title

§ 1-101. Short Title. This Act shall be known and may be cited as the Illinois Human Rights Act.

775 ILCS 5/1-102

5/1-102. Declaration of policy

§ 1-102. Declaration of Policy. It is the public policy of this State:

(A) Freedom from Unlawful Discrimination. To secure for all individuals within Illinois the freedom from discrimination because of race, color, religion, sex, national origin, ancestry, age, marital status, physical or mental handicap, or unfavorable discharge from military service in connection with employment, real estate transactions, access to financial credit, and the availability of public accommodations.

(B) Freedom from Sexual Harassment-Employment and Higher Education. To prevent sexual harassment in employment and sexual harassment in higher education.

(C) Freedom from Discrimination Based on Citizenship Status-Employment. To prevent discrimination based on citizenship status in employment.

(D) Freedom from Discrimination Based on Familial Status-Real Estate Transactions. To prevent discrimination based on familial status in real estate transactions.

(E) Public Health, Welfare and Safety. To promote the public health, welfare and safety by protecting the interest of all people in Illinois in maintaining personal dignity, in realizing their full productive capacities, and in furthering their interests, rights and privileges as citizens of this State.

(F) Implementation of Constitutional Guarantees. To secure and guarantee the rights established by Sections 17, 18 and 19 of Article I of the Illinois Constitution of 1970.

(G) Equal Opportunity, Affirmative Action. To establish Equal Opportunity and Affirmative Action as the policies of this State in all of its decisions, programs and activities, and to assure that all State departments, boards, commissions and instrumentalities rigorously take affirmative action to provide equality of opportunity and eliminate the effects of past discrimination in the internal affairs of State government and in their relations with the public.

(H) Unfounded Charges. To protect citizens of this State against unfounded charges of unlawful discrimination, sexual harassment in employment and sexual harassment in higher education, and discrimination based on citizenship status in employment.

775 ILCS 5/1-103

5/1-103. General definitions

§ 1-103. General Definitions. When used in this Act, unless the context requires otherwise, the term:

(A) Age. "Age" means the chronological age of a person who is at least 40 years old, except with regard to any practice

described in Section 2-102, insofar as that practice concerns training or apprenticeship programs. In the case of training or apprenticeship programs, for the purposes of Section 2-102, "age" means the chronological age of a person who is 18 but not yet 40 years old.

(B) Aggrieved Party. "Aggrieved party" means a person who is alleged or proved to have been injured by a civil rights violation or believes he or she will be injured by a civil rights violation under Article 3 that is about to occur.

(C) Charge. "Charge" means an allegation filed with the Department by an aggrieved party or initiated by the Department under its authority.

(D) Civil Rights Violation. "Civil rights violation" includes and shall be limited to only those specific acts set forth in Sections 2-102, 2-103, 2-105, 3-102, 3-103, 3-104, 3-104.1, 3-105, 4-102, 4-103, 5-102, 5A-102 and 6-101 of this Act.

(E) Commission. "Commission" means the Human Rights Commission created by this Act.

(F) Complaint. "Complaint" means the formal pleading filed by the Department with the Commission following an investigation and finding of substantial evidence of a civil rights violation.

(G) Complainant. "Complainant" means a person including the Department who files a charge of civil rights violation with the Department or the Commission.

(H) Department. "Department" means the Department of Human Rights created by this Act.

(I) Handicap. "Handicap" means a determinable physical or mental characteristic of a person, including, but not limited to, a determinable physical characteristic which necessitates the person's use of a guide, hearing or support dog, the history of such

characteristic, or the perception of such characteristic by the person complained against, which may result from disease, injury, congenital condition of birth or functional disorder and which characteristic:

(1) For purposes of Article 2 is unrelated to the person's ability to perform the duties of a particular job or position;

(2) For purposes of Article 3, is unrelated to the person's ability to acquire, rent or maintain a housing accommodation;

(3) For purposes of Article 4, is unrelated to a person's ability to repay;

(4) For purposes of Article 5, is unrelated to a person's ability to utilize and benefit from a place of public accommodation.

(J) Marital Status. "Marital status" means the legal status of being married, single, separated, divorced or widowed.

(K) National Origin. "National origin" means the place in which a person or one of his or her ancestors was born.

(L) Person. "Person" includes one or more individuals, partnerships, associations or organizations, labor organizations, labor unions, joint apprenticeship committees, or union labor associations, corporations, the State of Illinois and its instrumentalities, political subdivisions, units of local government, legal representatives, trustees in bankruptcy or receivers.

(M) Public Contract. "Public contract" includes every contract to which the State, any of its political subdivisions or any municipal corporation is a party.

(N) Religion. "Religion" includes all aspects of religious observance and practice, as well as belief, except that with respect to employers, for the purposes of Article 2, "religion" has the meaning ascribed to it in paragraph (F) of Section 2-101.

(O) Sex. "Sex" means the status of being male or female.

(P) Unfavorable Military Discharge. "Unfavorable military discharge" includes discharges from the Armed Forces of the United States, their Reserve components or any National Guard or Naval Militia which are classified as RE-3 or the equivalent thereof, but does not include those characterized as RE-4 or "Dishonorable".

(Q) Unlawful Discrimination. "Unlawful discrimination" means discrimination against a person because of his or her race, color, religion, national origin, ancestry, age, sex, marital status, handicap or unfavorable discharge from military service as those terms are defined in this Section.

ARTICLE 2. EMPLOYMENT

775 ILCS 5/2-101

5/2-101. Definitions

§ 2-101. Definitions. The following definitions are applicable strictly in the context of this Article.

(A) Employee.

(1) "Employee" includes:

(a) Any individual performing services for remuneration within this State for an employer;

(b) An apprentice;

(c) An applicant for any apprenticeship.

(2) "Employee" does not include:

(a) Domestic servants in private homes;

(b) Individuals employed by persons who are not "employers" as defined by this Act;

(c) Elected public officials or the members of their immediate personal staffs;

(d) Principal administrative officers of the State or of any political subdivision, municipal corporation or other governmental unit or agency;

(e) A person in a vocational rehabilitation facility certified under federal law who has been designated an evaluee, trainee, or work activity client.

(B) Employer.

(1) "Employer" includes:

(a) Any person employing 15 or more employees within Illinois during 20 or more calendar weeks within the calendar year of or preceding the alleged violation;

(b) Any person employing one or more employees when a complainant alleges civil rights violation due to unlawful discrimination based upon his or her physical or mental handicap unrelated to ability or sexual harassment;

(c) The State and any political subdivision, municipal corporation or other government unit or agency, without regard to the number of employees;

(d) Any party to a public contract without regard to the number of employees;

(e) A joint apprenticeship or training committee without regard to the number of employees.

(2) "Employer" does not include any religious corporation, association, educational institution, society, or nonprofit nursing institution conducted by and for those who rely upon treatment by prayer through spiritual means in accordance with the tenets of a recognized church or religious

denomination with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, society or non-profit nursing institution of its activities.

(C) Employment Agency. "Employment Agency" includes both public and private employment agencies and any person, labor organization, or labor union having a hiring hall or hiring office regularly undertaking, with or without compensation, to procure opportunities to work, or to procure, recruit, refer or place employees.

(D) Labor Organization. "Labor Organization" includes any organization, labor union, craft union, or any voluntary unincorporated association designed to further the cause of the rights of union labor which is constituted for the purpose, in whole or in part, of collective bargaining or of dealing with employers concerning grievances, terms or conditions of employment, or apprenticeships or applications for apprenticeships, or of other mutual aid or protection in connection with employment, including apprenticeships or applications for apprenticeships.

(E) Sexual Harassment. "Sexual harassment" means any unwelcome sexual advances or requests for sexual favors or any conduct of a sexual nature when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.

(F) Religion. "Religion" with respect to employers includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to

reasonably accommodate an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

(G) Public Employer. "Public employer" means the State, an agency or department thereof, unit of local government, school district, instrumentality or political subdivision.

(H) Public Employee. "Public employee" means an employee of the State, agency or department thereof, unit of local government, school district, instrumentality or political subdivision. "Public employee" does not include public officers or employees of the General Assembly or agencies thereof.

(I) Public Officer. "Public officer" means a person who is elected to office pursuant to the Constitution or a statute or ordinance, or who is appointed to an office which is established, and the qualifications and duties of which are prescribed, by the Constitution or a statute or ordinance, to discharge a public duty for the State, agency or department thereof, unit of local government, school district, instrumentality or political subdivision.

(J) Eligible Bidder. "Eligible bidder" means a person who, prior to a bid opening, has filed with the Department a properly completed, sworn and currently valid employer report form, pursuant to the Department's regulations. The provisions of this Article relating to eligible bidders apply only to bids on contracts with the State and its departments, agencies, boards, and commissions, and the provisions do not apply to bids on contracts with units of local government or school districts.

(K) Citizen Status. "Citizenship status" means the status of being:

(1) a born U.S. citizen;

(2) a naturalized U.S. citizen;

(3) a U.S. national; or

(4) a person born outside the United States and not a U.S. citizen who is not an unauthorized alien and who is protected from discrimination under the provisions of Section 1324b of Title 8 of the United States Code, as now or hereafter amended.

775 ILCS 5/2-102

5/2-102. Civil rights violations—Employment

§ 2-102. Civil Rights Violations—Employment. It is a civil rights violation:

(A) Employers. For any employer to refuse to hire, to segregate, or to act with respect to recruitment, hiring, promotion, renewal of employment, selection for training or apprenticeship, discharge, discipline, tenure or terms, privileges or conditions of employment on the basis of unlawful discrimination or citizenship status.

(B) Employment Agency. For any employment agency to fail or refuse to classify properly, accept applications and register for employment referral or apprenticeship referral, refer for employment, or refer for apprenticeship on the basis of unlawful discrimination or citizenship status or to accept from any person any job order, requisition or request for referral of applicants for employment or apprenticeship which makes or has the effect of making unlawful discrimination or discrimination on the basis of citizenship status a condition of referral.

(C) Labor Organization. For any labor organization to limit, segregate or classify its membership, or to limit employment opportunities, selection and training for apprenticeship in any trade or craft, or otherwise to take, or fail to take, any action which affects adversely any person's status as an employee or as an applicant for employment or as an apprentice, or as an applicant for apprenticeships, or wages, tenure, hours of employment or

apprenticeship conditions on the basis of unlawful discrimination or citizenship status.

(D) Sexual Harassment. For any employer, employee, agent of any employer, employment agency or labor organization to engage in sexual harassment; provided, that an employer shall be responsible for sexual harassment of the employer's employees by nonemployees or nonmanagerial and nonsupervisory employees only if the employer becomes aware of the conduct and fails to take reasonable corrective measures.

(E) Public Employers. For any public employer to refuse to permit a public employee under its jurisdiction who takes time off from work in order to practice his or her religious beliefs to engage in work, during hours other than such employee's regular working hours, consistent with the operational needs of the employer and in order to compensate for work time lost for such religious reasons. Any employee who elects such deferred work shall be compensated at the wage rate which he or she would have earned during the originally scheduled work period. The employer may require that an employee who plans to take time off from work in order to practice his or her religious beliefs provide the employer with a notice of his or her intention to be absent from work not exceeding 5 days prior to the date of absence.

(F) Training and Apprenticeship Programs. For any employer, employment agency or labor organization to discriminate against a person on the basis of age in the selection, referral for or conduct of apprenticeship or training programs.

(G) Immigration-Related Practices. For an employer to request for purposes of satisfying the requirements of Section 1324a(b) of Title 8 of the United States Code, as now or hereafter amended, more or different documents than are required under such Section or to refuse to honor documents tendered that on their face reasonably appear to be genuine.

It is not a civil rights violation for an employer to take any action that is required by Section 1324a of Title 8 of the United States Code, as now or hereafter amended.

775 ILCS 5/2-103

5/2-103. Arrest record

§ 2-103. Arrest Record. Unless otherwise authorized by law, it is a civil rights violation for any employer, employment agency or labor organization to inquire into or to use arrest information or criminal history record information ordered expunged, sealed or impounded under Section 5 of the Criminal Identification Act[1] as a basis to refuse to hire, to segregate, or to act with respect to recruitment, hiring, promotion, renewal of employment, selection for training or apprenticeship, discharge, discipline, tenure or terms, privileges or conditions of employment. This Section does not prohibit a State agency, unit of local government or school district, or private organization from utilizing conviction information obtained from the Department of State Police under the provisions of Section 3 of the Criminal Identification Act[2] in evaluating the qualifications and character of an employee or a prospective employee.

775 ILCS 5/2-104

5/2-104. Exemptions

§ 2-104. Exemptions.

(A) Nothing contained in this Act shall prohibit an employer, employment agency or labor organization from:

(1) Bona Fide Qualification. Hiring or selecting between persons for bona fide occupational qualifications or

any reason except those civil-rights violations specifically identified in this Article.

(2) Veterans. Giving preferential treatment to veterans and their relatives as required by the laws or regulations of the United States or this State or a unit of local government.

(3) Unfavorable Discharge From Military Service. Using unfavorable discharge from military service as a valid employment criterion when authorized by federal law or regulation or when a position of employment involves the exercise of fiduciary responsibilities as defined by rules and regulations which the Department shall adopt.

(4) Ability Tests. Giving or acting upon the results of any professionally developed ability test provided that such test, its administration, or action upon the results, is not used as a subterfuge for or does not have the effect of unlawful discrimination.

(5) Merit and Retirement Systems.

(a) Applying different standards of compensation, or different terms, conditions or privileges of employment pursuant to a merit or retirement system provided that such system or its administration is not used as a subterfuge for or does not have the effect of unlawful discrimination.

(b) Effecting compulsory retirement of any employee who has attained 65 years of age and who, for the 2-year period immediately preceding retirement, is employed in a bona fide executive or a high policymaking position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans of the employer of such employee, which equals, in the aggregate, at least

$44,000. If any such retirement benefit is in a form other than a straight life annuity (with no ancillary benefits) or if the employees contribute to any such plan or make rollover contributions, the retirement benefit shall be adjusted in accordance with regulations prescribed by the Department, so that the benefit is the equivalent of a straight life annuity (with no ancillary benefits) under a plan to which employees do not contribute and under which no rollover contributions are made.

(c) Under January 1, 1994, effecting compulsory retirement of any employee who has attained 70 years of age, and who is serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure) at an institution of higher education as defined by Section 1201(a) of the Higher Education Act of 1965.[1]

(6) Training and Apprenticeship Programs. Establishing an educational requirement as a prerequisite to selection for a training or apprenticeship program, provided such requirement does not operate to discriminate on the basis of any prohibited classification except age.

(7) Police and Firefighter Retirement. Imposing a mandatory retirement age for firefighters or law enforcement officers if prior to December 31, 1993, the law enforcement officer or firefighter has attained the age of retirement in effect under applicable state or local law on March 3, 1983 and if such retirement action is taken pursuant to a bona fide retirement plan. This paragraph (7) shall not apply with respect to any cause of action arising under the Illinois Human Rights Act as in effect prior to December 3, 1987 (the effective date of Public Act 85-949).

(8) Police and Firefighter/Paramedic Appointment. Failing or refusing to hire or to discharge any individual because of such individual's age if such action is taken with respect to the employment of an individual as a firefighter/paramedic or as a law enforcement officer and the individual has attained the age of hiring or retirement in effect under applicable State or local law, which provides a maximum age hiring limitation or for mandatory retirement, in effect on or before March 3, 1983.

As used in this paragraph (8):

(a) "Firefighter/paramedic" means an employee, the duties of whose position are primarily to perform work directly connected with the control and extinguishment of fires or the maintenance and use of firefighting apparatus and equipment, or to provide emergency medical services, including an employee engaged in this activity who is transferred to a supervisory or administrative position.

(b) "Law enforcement officer" means an employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of criminal offenses, including an employee engaged in this activity who is transferred to a supervisory or administrative position.

The provisions of this paragraph (8) shall remain in effect until December 31, 1993 or until similar provisions in Section 4 of the federal Age Discrimination in Employment Act of 1967 (29 U.S. Code 623) are deleted or repealed, whichever is later.

(9) Citizenship Status. Making legitimate distinctions based on citizenship status if specifically authorized or required by State or federal law.

(B) With respect to any employee who is subject to a collective bargaining agreement:

(a) which is in effect on June 30, 1986,

(b) which terminates after January 1, 1987,

(c) any provision of which was entered into by a labor organization as defined by Section 6(d)(4) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)(4)), and

(d) which contains any provision that would be superseded by this amendatory Act of 1987 (Public Act 85-748),

such amendatory Act of 1987 shall not apply until the termination of such collective bargaining agreement or January 1, 1990, whichever occurs first.

775 ILCS 5/2-105

5/2-105. Equal employment opportunities—Affirmative action

§ 2-105. Equal Employment Opportunities, Affirmative Action.

(A) Public Contracts. Every party to a public contract and every eligible bidder shall:

(1) Refrain from unlawful discrimination and discrimination based on citizenship status in employment and undertake affirmative action to assure equality of employment opportunity and eliminate the effects of past discrimination;

(2) Comply with the procedures and requirements of the Department's regulations concerning equal employment opportunities and affirmative action;

(3) Provide such information, with respect to its employees and applicants for employment, and assistance as the Department may reasonably request.

(B) State Agencies. Every State executive department, State agency, board, commission, and instrumentality shall:

(1) Comply with the procedures and requirements of the Department's regulations concerning equal employment opportunities and affirmative action;

(2) Provide such information and assistance as the Department may request.

(3) Establish, maintain, and carry out a continuing affirmative action plan consistent with this Act and the regulations of the Department designed to promote equal opportunity for all State residents in every aspect of agency personnel policy and practice. For purposes of these affirmative action plans, the race and national origin categories to be included in the plans are: African American, Hispanic or Latino, Native American, Asian, and any other category as required by Department rule. This plan shall include a current detailed status report:

(a) indicating, by each position in State service, the number, percentage, and average salary of individuals employed by race, national origin, sex and disability, and any other category that the Department may require by rule;

(b) identifying all positions in which the percentage of the people employed by race, national origin, sex and disability, and any other category that the Department may require by rule, is less than four-fifths of the percentage of each of those components in the State work force;

(c) specifying the goals and methods for increasing the percentage by race, national origin, sex and disability, and any other category that the Department may require by rule, in State positions,

(d) indicating progress and problems toward meeting equal employment opportunity goals, including, if applicable, but not limited to, Department of Central Management Services recruitment efforts, publicity, promotions, and use of options designating positions by linguistic abilities;

(e) establishing a numerical hiring goal for the employment of qualified persons with disabilities in the agency as a whole, to be based on the proportion of people with work disabilities in the Illinois labor force as reflected in the most recent decennial Census.

(4) If the agency has 1000 or more employees, appoint a full-time Equal Employment Opportunity officer, subject to the Department's approval, whose duties shall include:

(a) Advising the head of the particular State agency with respect to the preparation of equal employment opportunity programs, procedures, regulations, reports, and the agency's affirmative action plan.

(b) Evaluating in writing each fiscal year the sufficiency of the total agency program for equal employment opportunity and reporting thereon to the head of the agency with recommendations as to any improvement or correction in recruiting, hiring or promotion needed, including remedial or disciplinary action with respect to managerial or supervisory employees who have failed to cooperate fully or who are in violation of the program.

(c) Making changes in recruitment, training and promotion programs and in hiring and promotion procedures designed to eliminate discriminatory practices when authorized.

(d) Evaluating tests, employment policies, practices and qualifications and reporting to the head of the agency and to the Department any policies, practices and qualifications that have unequal impact by race, national origin as required by Department rule, sex or disability or any other category that the Department may require by rule, and to assist in the recruitment of people in underrepresented classifications. This function shall be performed in cooperation with the State Department of Central Management Services.

(e) Making any aggrieved employee or applicant for employment aware of his or her remedies under this Act.

(5) As used in this subsection (B), "disability" shall be defined in rules promulgated under the Illinois Administrative Procedure Act.[1]

(C) Civil Rights Violations. It is a civil rights violation for any public contractor or eligible bidder to:

(1) fail to comply with the public contractor's or eligible bidder's duty to refrain from unlawful discrimination and discrimination based on citizenship status in employment under subsection (A)(1) of this Section; or

(2) fail to comply with the public contractor's or eligible bidder's duties or affirmative action under subsection (A)(1) of this Section and subsection (A)(2) and (A)(3) of this Section, provided however, that the Department has notified the public contractor or eligible bidder in writing by certified mail that the public contractor or eligible bidder may not be in compliance with affirmative action requirements of subsection (A)(1) and with subsections (A)(2) and (A)(3) of this Section, and is given a minimum of 60 days to comply with the requirements.